

F.D. 30400 - 1/29/85 - PGS. 9218-9276

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.  
Tuesday, January 29, 1985

The hearing in the above-entitled matter was  
convened, pursuant to recess, at 9:05 a.m.

BEFORE:  
JAMES E. HOPKINS,  
Administrative Law Judge

APPEARANCES:  
As heretofore noted.

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C O N T E N T S

2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
3	Paul H. Banner				
4	By Mr. Von Salzen	9221			
	By Mr. Wilson		9223		
5	By Mr. Ratner		9342		
	By Mr. Solander		9350		

(AFTERNOON SESSION 1:45 p. m., Page 9359)

8	Michael A. Nelson				
9	By Mr. Von Salzen	9359			
	By Mr. Smith		9361		
11	Michael A. Nelson				
	Paul H. Banner				
12	By Mr. Von Salzen	9434			
13	By Mr. Wilson		9436		

E X H I B I T S

17	<u>Exhibit No.</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
18	SFSP-C-122, SFSP-C-123, & SFSP-C-124	9371	9433
19	SFSP-C-125	9383	9433
20	SFSP-C-126	9391	9434
21	SFSP-C-127	9470	9470

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## P R O C E E D I N G S

(9:05 A.M.)

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

Mr. Moates, you had a preliminary matter?

MR. MOATES: Yes, thank you, Your Honor.

I would like to suggest to any interested counsel that since tomorrow will really be the last full day of hearings, that counsel who are interested in dates, procedural matters, what have you, might gather here at 12:00 o'clock tomorrow, during the noon recess, to discuss these matters informally, and that assuming agreement, we could then go on the record at 12:30 with Judge Hopkins and make any alterations to the schedule of filing dates that may be appropriate or deal with any procedural matters like transcript corrections that the Judge may need to address.

So, we would hope that everyone who is available could come in tomorrow. We all recognize that Thursday will be a very short hearing day, and most counsel probably will not be here.

Thank you.

MR. LEARY: Judge, would it be helpful if you gave us some idea of what changes you might be wanting to --

MR. MOATES: The only change in terms of dates

1 that we are going to propose is simply a three-day  
2 change in the February 18th filing date for our evidence  
3 in opposition to responsive applications to conform to  
4 the 21 days that have been agreed upon would be in place  
5 between the termination of the phase and the filing of  
6 evidence for the next phase.

7 It is the same three-day extension, in  
8 essence, that protestants got at the end of the last  
9 phase. So it is a fairly minor change. We would be  
10 proposing that our evidence be due on February 21.

11 JUDGE HOPKINS: I might also suggest while you  
12 are discussing all these things whether you can agree on  
13 them or not, but for notification as to who you want to  
14 cross examine, and use the same basis we have had  
15 previously of 14 days before the stage of the hearing.

16 Now, we have the situation where the  
17 Department of Justice and other governmental witnesses  
18 would be on late in the proceeding, so there is some  
19 question whether there is any need for them to be  
20 notified at the same time as the applicants' witnesses,  
21 for example.

22 You can discuss that, and that could be worked  
23 out on the 14-day basis prior to the beginning of the  
24 governmental witnesses. You could discuss all these  
25 matters.

1 MR. MOATES: Very well.

2 JUDGE HOPKINS: Thank you. Mr. Von Salzen,  
3 are you going to handle this?

4 MR. VON SALZEN: Your Honor, the Rio Grande  
5 calls Paul H. Banner.

6 JUDGE HOPKINS: We don't have the mike here  
7 today, and I will tell you why. It has been distorting  
8 the record for the reporter, and I think it is more  
9 important, frankly, to get the record correct than it is  
10 to have everybody be able to hear in the back. So, Dr.  
11 Banner, would you speak up? I have tried to tell all  
12 the witnesses the same thing.

13 MR. BANNER: I shall do my best.

14 Whereupon,

15 PAUL H. BANNER

16 was called as a witness, and having been first duly  
17 sworn, took the stand, and was examined and testified as  
18 follows:

19 DIRECT EXAMINATION

20 BY MR. VON SALZEN:

21 Q Dr. Banner, do you have before you your  
22 verified statement filed September 10, 1984, in Volum  
23 DRGW-14?

24 A I do.

25 Q Are there any changes that you wish to make to

1 your verified statement at this time?

2 A If I may be allowed, the only change I would  
3 make is in my qualifications, I have changed employment  
4 since filing this statement, and I am now working for a  
5 railroad. I am the chairman and chief executive officer  
6 of the Iowa Interstate Railroad.

7 Q Thank you, Dr. Banner.

8 With that change, is that verified statement  
9 correct to the best of your knowledge and belief?

10 A It is.

11 Q Do you also have before you your verified  
12 opposition statement filed November 21, 1984, in Volume  
13 DRGW-20?

14 A I do.

15 Q Do you have any changes you wish to make in  
16 that verified statement?

17 A No, I do not.

18 Q Is that verified statement then correct to the  
19 best of your knowledge and belief?

20 A It is.

21 Q Do you adopt these two verified statements as  
22 your testimony in these proceedings?

23 A I do.

24 MR. VON SALZEN: We have no further questions,  
25 Your Honor. The witness is available for cross

1 examination.

2 JUDGE HOPKINS: Mr. Wilson.

3 CROSS EXAMINATION

4 BY MR. WILSON:

5 Q Good morning, Dr. Banner. My name is Dennis  
6 Wilson, representing the applicants in this case.

7 Dr. Banner, I would like to start with your  
8 September 10th verified statement, if we may. Is it  
9 correct that the starting point for your analysis of the  
10 competitive impact of the SPSF merger was the definition  
11 of the traffic universe that you analyzed?

12 A In specific data, yes.

13 Q Is it also correct that the traffic which you  
14 analyzed was all rail traffic originating or terminating  
15 in the territory which you describe as the CP  
16 territory?

17 A Traffic from and to. Yes.

18 Q Sir, on Page 5 of your testimony, you state  
19 that Witness Brainard defined the geographic area that  
20 makes up what you call the CP territory. Did you  
21 participate in Mr. Brainard's definition of the  
22 geographic boundaries of this market?

23 A No, I did not.

24 Q Could you describe what were Mr. Brainard's  
25 criteria in determining the boundaries of the CP



1 territory that you analyzed?

2 A They were Mr. Brainard's, and since I did not  
3 have discussion with him, I did not feel qualified to  
4 discuss that, other than that it was what was called the  
5 CP territory that, as I mentioned on Page 5, it  
6 approximates the old Central Pacific Railroad territory.

7 Q Other than that, you are not aware of what Mr.  
8 Brainard's criteria were? Is that right?

9 A Not specifically.

10 Q Did Mr. Brainard perform any study of  
11 elasticity of supply and demand or the way shippers  
12 perceived the market when he drove these boundaries  
13 around the CP territory, do you know?

14 A As I said, I did not participate in that  
15 discussion. Therefore I have no knowledge of that.

16 Q Okay. Have you made any study to test whether  
17 Mr. Brainard's CP territory is a distinct geographic  
18 market for the transportation of freight?

19 A I have not made any specific study, but my  
20 knowledge of the industry is sufficient to identify it  
21 as a reasonable territorial distribution.

22 Q By a reasonable territorial distribution, do  
23 you mean that in your view this does constitute an  
24 appropriate geographic market for the transportation of  
25 freight?

1 A Reasonably so.

2 Q And you have done no specific test or analysis  
3 to test whether or not that is true? This is just your  
4 own general knowledge. Is that right?

5 Other than in the data that we have for the  
6 territory.

7 Q Right. Well, you used the data from the  
8 territory, but did you perform any tests with that data  
9 to determine whether the territory should be larger, for  
10 example?

11 A No, I did not.

12 Q And did you perform any tests to determine  
13 whether perhaps some of the counties that were  
14 aggregated in the CP territory would be more  
15 appropriately aggregated in other markets?

16 A No, I did not.

17 Q In your view, Dr. Banner, what are the factors  
18 that ought to be considered in determining whether a  
19 geographic area is an appropriate geographic market for  
20 the transportation of freight?

21 A I don't think I discussed that in my testimony  
22 at all. I would have to be thinking right off the top  
23 of my head. I don't think I was asked to do that in my  
24 studies.

25 Q Well, sir, you have made analysis and a number

1 of conclusions based on traffic flowing to and from a  
2 specific defined geographic area. And I am attempting  
3 to determine what you believe the proper criteria are  
4 for defining a geographic market for the transportation  
5 of freight. Could you state in general terms what you  
6 believe those criteria to be?

7 A Well, as I said, I was not given that task, to  
8 review what Mr. Brainard did, and therefore I did not  
9 consider that specific question.

10 Q Yes, sir. Okay. But you also said, I  
11 believe, that you thought that this geographic  
12 territory, the CP territory you use in your statement  
13 reasonably reflected an appropriate geographic market.  
14 What are the reasons why you believe that?

15 A I believe that is a reasonable territory, and  
16 that the geographic distributions according to the old  
17 freight districts approximate this, and that this  
18 territory reflects the corridors through which  
19 transportation in this territory is occurring, and  
20 therefore this is the territory that -- from a rate  
21 standpoint it is the western district to eastern and  
22 southern or transcontinental territory.

23 And therefore I accept it as a reasonable  
24 allocation of traffic based upon the old freight  
25 territories.

1 Q Okay. By old freight territories, you are  
2 referring to the definitions of territories in freight  
3 tariffs?

4 A That is correct.

5 Q Are you aware of the definition, the  
6 geographic market definition of the state of California  
7 that Dr. Carlton used in his analysis?

8 A I believe he used the entire state.

9 Q Yes. Does it bother you that there is a  
10 difference in the geographic market definition he used  
11 as opposed to the CP territory definition that you use  
12 in your analysis?

13 A I think that the definition that Professor  
14 Carlton used was for his own purposes, and I think you  
15 would have to ask him why he used his statewide  
16 definition.

17 Sometimes you use data because that is the way  
18 data are available for generalized or total data that  
19 are published, and from a traffic standpoint we use the  
20 data that are more akin to what we customarily use in  
21 traffic, and therefore we use the traffic distribution  
22 data which the ICC uses in its data.

23 Q Yes, sir. But that really wasn't my  
24 question. My question is, do you have any problem with  
25 the fact that your definition is different from Dr.

1 Carlton's definition?

2 A We use it for different purposes, so I don't  
3 question Dr. Carlton's, Professor Carlton's use of the  
4 state of California for his purposes.

5 Q Okay. What are the different purposes?

6 A I think Professor Carlton's testimony stands  
7 on its own, and you can ask him why he used that for his  
8 definition. I did not discuss it with him.

9 Q Right. My question is, what were the  
10 different purposes? In what way was the purpose of your  
11 analysis different from the purpose of Professor  
12 Carlton's?

13 A I could speak for my own. My own is that I  
14 was dealing with the flow of traffic from what we call  
15 the CP territory to transcontinental, and therefore I  
16 studied the traffic between these two jurisdictions.

17 Q Do you think, sir, that you ought to consider  
18 the type of economic activity in an area and whether  
19 that is distinct from economic activity in another area  
20 in determining whether or not an area is an appropriate  
21 separate market for freight transportation?

22 A I think I did that. I did consider the  
23 territory that we believed was appropriate, particularly  
24 since that is the territory that Mr. Brainard, with his  
25 experience as a traffic officer, outlined as the

1 territory that we were studying.

2 Q Okay, so you agree that you ought to look at  
3 the type of economic activity in an area in defining --

4 A Whoever defines it, I presume, looked at it.  
5 Mr. Brainard looked at it. And I accepted his  
6 definition of the CP territory. Everybody -- I am not  
7 quite sure what you are referring to.

8 Q I understand. We are not quite communicating,  
9 I don't think. My question is simply, do you agree that  
10 that is an appropriate factor to look at, in fact, an  
11 important factor to look at in determining an  
12 appropriate geographic market for freight  
13 transportation?

14 A Would you define factor again? I lost the  
15 thread.

16 Q Do you agree that you ought to consider the  
17 level and the character of economic activity in a region  
18 in determining whether or not a particular area is a  
19 separate market for freight transportation? That is my  
20 question.

21 A Well, I would try to define the territory  
22 according to the transportation area in order to  
23 consider it for transportation, yes.

24 Q Would you also look at the principle  
25 commodities of freight moving to or from that territory,

1 and if those were generally common, consider it as part  
2 of the same territory?

3 A No, I would only look at the commodities in  
4 the territory that I am studying, and if other areas  
5 impinge upon it, there are cases when I would look at  
6 it, yes, but each one must stand on its own.

7 Q All right. Well, perhaps we could turn to  
8 your Figure 1, which is following your Table 1. And I  
9 have some questions about some of the areas that were  
10 included and excluded from the CP territory.

11 I notice that the CP territory excludes a  
12 fairly large area of northern California north of the  
13 San Francisco Bay area. Do you know why that area was  
14 not included in the CP territory?

15 A I believe, as I mentioned, that decision was  
16 made by Mr. Brainard, and I think it would be  
17 appropriate to ask Mr. Brainard about the definition of  
18 the territory.

19 Q You yourself have no idea why that area is not  
20 included? Is that right?

21 A I did not study it.

22 Q Okay. Isn't the type of freight shipped from  
23 that area, the lumber and wood products freight, the  
24 same type of freight that is primarily shipped from the  
25 western Oregon region and the northeast California

1 region that you did include in the CP territory?

2 A I do not know what varieties of wood are  
3 shipped from those separate areas and what markets they  
4 have. I did not study it.

5 Q That is true, but would you agree that it is  
6 primarily a lumber and wood products originating region,  
7 just like western Oregon and northeast California?

8 A Again, I would answer that you would have to  
9 study the individual commodities. Different types of  
10 woods are used for different purposes, and I do not know  
11 if there is such a difference there without studying  
12 it. And I did not study it.

13 Q Okay, so you don't know any material  
14 distinctions in freight traffic moving from this  
15 northern California that was excluded from the market  
16 compared to traffic moving from the western Oregon  
17 region and the northeast California region that was --

18 A I made no study of it, and collected no data  
19 on those other areas, so I cannot answer you.

20 Q Now, do you know whether the traffic  
21 originating in this northern California area that you  
22 excluded from your study generally moves over the Golden  
23 gateway when handled in transcontinental freight  
24 shipments?

25 A I do not know, not having made any study of



1 that traffic.

2 Q Would it make any difference, do you think, in  
3 attempting to define an appropriate geographic market,  
4 whether or not traffic from this area generally does  
5 move over the Ogden gateway when in transcontinental  
6 shipments?

7 A I would have to have studied it to see whether  
8 it was a part of the marketing territory. I regret I  
9 cannot answer your question.

10 Q Okay. I understand you haven't studied it.  
11 In attempting to come up with a CP territory, does it  
12 make a difference whether the traffic that you are  
13 looking at generally moved over the Ogden gateway within  
14 transcontinental service?

15 MR. VON SALZEN: Your Honor, at this point I  
16 am going to object.

17 JUDGE HOPKINS: Let him answer the question if  
18 he can.

19 Can you answer that question?

20 THE WITNESS: May I have it repeated?

21 BY MR. WILSON: (Resuming)

22 Q In attempting to define the CP territory, I  
23 realize you did not do that, but in attempting to  
24 analyze it, you did use it as the basis for your  
25 analysis. Is it not important that the traffic flow

1 moved over the Ogden gateway on transcontinental  
2 movements?

3 A I would presume that Mr. Brainard, making his  
4 study, faced that issue, and would be more capable than  
5 I to answer that question.

6 Q So to you it is not particularly important one  
7 way or the other?

8 A No, it is not.

9 Q Now, sir, in terms of -- I do have a few more  
10 questions about this, because I still need to try to  
11 understand it. In terms of the southern boundary of the  
12 CP territory in California, it appears that that  
13 territory extends about one-third of the way down the  
14 San Joaquin Valley. Is that about right?

15 MR. VON SALZEN: Your Honor, at this stage I  
16 do want to interpose an objection. Dr. Banner has  
17 testified repeatedly that he played no role in defining  
18 the CP territory, and yet we have had the last five or  
19 ten minutes of questions about defining the CP  
20 territory. This is beyond the scope of Dr. Banner's  
21 testimony.

22 It is within the scope of Mr. Brainard's  
23 testimony. Mr. Brainard is going to be testifying  
24 before very long. I suggest that this is beyond the  
25 scope of direct examination and is improper cross

1 examination.

2 JUDGE HOPKINS: Where are you going with  
3 this?

4 MR. WILSON: Your Honor, the table in Dr.  
5 Banner's testimony, the figure here and his entire  
6 analysis depend on the definition of territory, the  
7 statistics he cites, the percentages he uses, and the  
8 conclusions he draws. I think it is very important to  
9 test his knowledge of the territory, and also to try to  
10 determine why it was decided, why it was defined the way  
11 it was to the extent that he knows.

12 JUDGE HOPKINS: He indicates he doesn't know.  
13 Mr. Brainard made the decision. So I don't see any  
14 reason why we should continue with this line of  
15 questioning.

16 MR. WILSON: Okay.

17 BY MR. WILSON: (Resuming)

18 Q Are you aware, sir, as one somewhat related  
19 question, of any distinctions in freight traffic flow to  
20 and from the northern third of the San Joaquin Valley  
21 compared to freight traffic flow to and from the  
22 southern two-thirds of the San Joaquin Valley?

23 A No, I do not.

24 Q Now, sir, one of the markets that you analyzed  
25 was north-south freight traffic in California. And you

1 concluded at Page 4 and also at Page 19 of your  
2 testimony that SPSF would monopolize the market for  
3 north-south traffic in California after the SFSP  
4 merger. Isn't that right?

5 A Page 4?

6 Q Yes, sir. In the fifth line of Page 4, for  
7 example, is one of the points where you make that  
8 conclusion. Do you see that?

9 A Fifth line from the top?

10 Q Yes.

11 A I think at Page 4 I refer to the  
12 anticompetitive effects would burden all  
13 transcontinental traffic.

14 Q Sir, where you say the SFSP merged system  
15 would monopolize north-south traffic in California -- do  
16 you see that? Perhaps -- this is your September  
17 verified statement that I am referring to.

18 A Yes, the SFSP merged system would monopolize  
19 the southern transportation -- the southern  
20 transcontinental corridor and north-south traffic in  
21 California. Okay.

22 Q Now, do you know how much freight traffic  
23 moving between northern and southern California moves by  
24 rail?

25 A No, I do not.

1 Q The Reebie data submitted by applicants show  
2 that railroads handle just less than 6 percent of this  
3 traffic, the trucks handling 72 percent, and the water  
4 carriers handling 22 percent. Do those figures sound  
5 about right to you?

6 A I have not looked at them. I will not comment  
7 on them.

8 Q Moreover, the Reebie data shows that Santa Fe  
9 only handles 1 percent of the traffic between north and  
10 south California today. Does that sound about right to  
11 you?

12 A I don't think that has relevance to the  
13 statement I made in my statement here, but if that data  
14 -- if you accept that Mr. Reebie said those, I will  
15 accept that Mr. Reebie said so.

16 Q How does a carrier which has on a merged basis  
17 only 6 percent of a transportation market have the  
18 ability to monopolize that market?

19 A I think my statement was that it would  
20 potentially burden all transcontinental traffic. I  
21 think I am discussing the transcontinental, the effect  
22 upon the transcontinental traffic of this merger.

23 Q So you do not think that SFSP would monopolize  
24 the market for north-south traffic in California? Is  
25 that right?

1           A     It could monopolize the north-south rail  
2 traffic.

3           Q     I am sorry. You said it could?

4           A     Or will.

5           Q     But it will not monopolize the north-south  
6 market for freight traffic in California?

7           A     In corridor traffic, I am discussing the rail  
8 traffic there.

9           Q     That leads to another restriction, at least as  
10 I interpret it, in the universe of the traffic that you  
11 studied. You didn't look at any truck traffic or any  
12 water carrier traffic in your analysis. Isn't that  
13 right?

14          A     I believe the analysis of truck traffic is in  
15 other people's testimony. Mr. Nelson discusses truck  
16 traffic. I think someone else in this proceeding  
17 discusses water transportation. No, I did not make  
18 studies of the water carrier traffic in this territory.

19          Q     Did you make the decision that when you did  
20 your analysis and your statistics, you would exclude  
21 trucks and water carriers?

22          A     I don't think I excluded anything. I studied  
23 the rail market and the rail transportation. I did not  
24 consciously not do something.

25          Q     Okay, sir. It is probably a matter of

1 semantics. Did you make the decision not to look at  
2 trucks or water carriers in your analysis?

3 A I was not asked to do the truck analysis in  
4 the territory.

5 Q Now, even conceding, sir, that for some  
6 traffic railroads may be the only effective competition,  
7 why would you not in analyzing the competitive impacts  
8 of this transaction consider that truck traffic which is  
9 directly competitive with the railroads in order to make  
10 your conclusions in your verified statement?

11 A Are you referring to the truck traffic in the  
12 territory I am discussing, which is the transcontinental  
13 market?

14 Q Yes.

15 A Well, I think my study is of the  
16 transcontinental traffic, the corridor analysis, and I  
17 think the data on truck movements in those corridors and  
18 in the transcontinental territory is discussed in the  
19 statement of Mr. Nelson, and I did not deal with that  
20 directly except as it is in my statement, and if there  
21 are any references to it in my statement, I will gladly  
22 respond to that.

23 Q But the percentages in your statement are  
24 overstated to the extent that they do not consider truck  
25 originated or terminated freight in your CP territory.

1 Isn't that right?

2 A No, I do not see that I have understated or  
3 overstated truck transportation at all. I am dealing  
4 with the rail transportation in the area, and the effect  
5 of the merger, and I am not quite certain what question  
6 you are asking about truck, because I didn't study  
7 micromovements of short haul truck movements within  
8 California.

9 Q Now, also important in your analysis is the  
10 definition of the eastern transcontinental territories.  
11 Did Mr. Brainard define the eastern transcontinental  
12 territory that is shown on your Figure 1 also?

13 A Yes.

14 Q Did you participate in Mr. Brainard's  
15 definition of that territory?

16 A No.

17 Q Are you aware of the criteria that Mr.  
18 Brainard used in defining that territory?

19 A No. I could look at the map and say that is a  
20 reasonable transcontinental territory for rail traffic  
21 moving from the CP territory. It shows all the  
22 gateways. It covers all the geographic areas that this  
23 traffic could and would move to and from.

24 Q Do you know the reason for the unusual line  
25 drawn through Texas, dividing Texas into two pieces?



1           A     I think Mr. Brainard in his wisdom chose the  
2 counties which were included in that territory, and I  
3 presume there was both feasibility and rail network.

4           Q     But you yourself do not know the reason why  
5 that line is drawn the way it is?

6           A     No, I did not participate in that decision.

7           Q     Now, I have trouble understanding why any of  
8 Texas or Louisiana would be included in that eastern  
9 transcontinental territory. Isn't it true that over 80  
10 percent of the traffic moving from the CP territory to  
11 Texas and Louisiana moves through the Southern Corridor  
12 today and doesn't go through --

13           MR. VON SALZEN: Your Honor, I will object  
14 again. I do object. We are getting now on the eastern  
15 end into the same question of geographic determination  
16 that Dr. Banner has testified was performed by Mr.  
17 Brainard, that he had no participation in it, and  
18 therefore I would submit that these questions have again  
19 strayed beyond the scope of direct examination.

20           JUDGE HOPKINS: That question wasn't  
21 concerning that.

22           MR. VON SALZEN: Well, I so interpreted it,  
23 Your Honor, but I stand corrected.

24           JUDGE HOPKINS: Well, I didn't.

25           Go ahead, Mr. Wilson.

1 BY MR. WILSON: (Resuming)

2 Q Isn't it true that over 80 percent of the  
3 traffic moving from the CP territory to Texas and  
4 Louisiana moves via the Southern Corridor and not via  
5 Ogden?

6 A I don't believe I gathered the data on the  
7 state to state movements, so I can't answer you.

8 Q Well, if that were true, would not inclusion  
9 of this traffic artificially inflate the origin and  
10 destination figures that you use for Santa Fe and  
11 Southern Pacific?

12 A No, I do not believe so, because traffic going  
13 through the Central Corridor using the gateways Kansas  
14 City or St. Louis -- Kansas City could go down into that  
15 territory, but again I say I did not choose those  
16 territories. I believe Mr. Brainard as traffic witness  
17 probably recognized that that was a marketing territory,  
18 and included them, but again, I suggest that you discuss  
19 the configuration of Texas and Louisiana with Mr.  
20 Brainard.

21 Q Do you believe it is appropriate to include in  
22 your analysis traffic flows where the Central Corridor  
23 is competing against the Southern Corridor?

24 A For certain purposes, yes.

25 Q What purposes would that be?

1           A     Well, if you were taking San Francisco to  
2 Washington, D.C., it could go both corridors. They are  
3 competitive corridors in the long haul transportation  
4 from Mountain Pacific or Pacific Coast territories to  
5 official territory.

6           Q     Did you generate data that would show a  
7 subtotal of how much traffic moved between the CP  
8 territory and the Texas-Louisiana territory?

9           A     No, I did not.

10          Q     And you have no idea here at this time about  
11 how much of the origin and destination traffic that you  
12 rely on moved instead between the CP territory and  
13 Texas-Louisiana? Is that right?

14          A     No, I don't have any data on that.

15          Q     Sir, at the bottom of Page 7 you refer to  
16 differences in SP and Santa Fe gathering distribution  
17 networks in the territory. Could you describe the  
18 differences that you are referring to here?

19          A     The geographic differences in the territories  
20 they cover.

21          Q     Could you elaborate on that a little bit?  
22 What differences?

23          A     This is an introductory statement. A general  
24 statement. Do you have something specific that you are  
25 referring to? Otherwise, I could discuss the

1 configuration of the two railroads ad nauseum.

2 Q Are you referring primarily to the fact that  
3 the geographic portion of the CP territory served by  
4 Southern Pacific is generally quite a bit different than  
5 the geographic portion of the CP territory served by  
6 Santa Fe?

7 A Yes, they are somewhat different and they  
8 overlap.

9 Q But for most of that territory, for example,  
10 Southern Pacific serves Nevada, Utah, Oregon, much of  
11 northern California, and Santa Fe doesn't serve it at  
12 all. Is that right?

13 A The Santa Fe serves that Southern Pacific  
14 territory and the Southern Pacific serves that  
15 territory, but the Southern Pacific goes farther north,  
16 covers northern California, and serves many points  
17 exclusively in that territory with a vast network.

18 Q Sir, on Page 6, your Footnote 2, you testify  
19 that Burlington Northern as a railroad handling only 7.9  
20 to 7.5 percent of the traffic moving to and from your CP  
21 territory "is of relatively minor significance."

22 Could we infer from that that an incremental  
23 increase in concentration in CP territory market of  
24 between 7.5 and 7.9 percent would be of relatively minor  
25 significance?

1           A     I am not quite sure that I said it in that  
2 manner. I said that the BN in this particular territory  
3 is of relatively minor significance; 7.5 percent in the  
4 territory is just 7.5 percent of 100, and is of minor  
5 significance relative to the merger of the Santa Fe and  
6 the SP.

7                     If someone carved out another 7.5 percent,  
8 that would be of significance. Another 7.5 percent,  
9 that is.

10           Q     A competitor in a market that has less than an  
11 8 percent share of traffic you would regard as of  
12 relatively minor significance? Is that right?

13           A     Minor is adjectival. Seven percent to someone  
14 who only has 3 percent is a doubling of his market  
15 share, and he would be very happy to get it, I presume.  
16 If the BN in this territory went from 7 to 15 percent,  
17 they would find it highly significant, and these are all  
18 relative terms.

19           Q     Yes, sir, but it is your term, and I am trying  
20 to understand what you mean.

21           A     I am saying that --

22           Q     Where do you draw the line in terms of market  
23 share percentage between a competitor that is of  
24 relatively minor significance and a competitor that is  
25 of some significance?

1           A       Well, the question is whether 7 percent will  
2 affect the other 93 percent. If the SP and the Santa Fe  
3 have a very large share there and the BN goes from 7 to  
4 8 percent, I would say that would be negligible. If the  
5 BN doubled its share, I would say it is important. I  
6 think you would have to look at the numbers and  
7 interpret the numbers as they occur.

8           Q       You also refer to the fact in this footnote  
9 that in some specific areas within the CP territory BN  
10 has a greater presence, but you dismiss that as not  
11 important. I take it that is because BN's greater  
12 presence in the local areas is not important because the  
13 local areas are not markets.

14                   Is that a correct interpretation of your  
15 thinking here?

16           A       My thinking is that whenever you have as broad  
17 and large a territory, there are always cases where you  
18 might have some particular place where it would be  
19 relatively more important but it wouldn't upset the  
20 cosmic order of things.

21           Q       Right, and is the reason for that the fact  
22 that these particular places or these local areas are  
23 not market?

24           A       No, they are markets, but in the order of  
25 things, the BN may have a particular territory which is

1 relatively more. From the entire territory, which I  
2 describe in this footnote, their figure is 7.5 percent.  
3 I am neither blowing it up or tearing it down. I gave  
4 the data for that territory.

5 Q You also describe BN in this footnote as only  
6 an incidental competitor. What do you mean by  
7 incidental competitor?

8 A Let me find the particular sentence. I think  
9 I state that the BN traffic is incidental to the Santa  
10 Fe-SP-UP competition involving those two corridors. The  
11 BN serves the Northern Corridor, and the traffic that  
12 they have goes over the Northern Corridor, and therefore  
13 I say it is incidental.

14 Q What difference does it make what the route of  
15 movement is, whether the BN handles it through the  
16 Northern Corridor or through Canada? The amount of  
17 competition that they offer in the market is going to be  
18 whatever it is. It is going to be the 8 percent of  
19 traffic that they are handling. Isn't that right?

20 A Because I was discussing the Central Corridor  
21 here, and therefore I say it is incidental. I am merely  
22 concerned about the effects of competition in the  
23 Central Corridor.

24 Q Well, sir, a corridor isn't a market, is it?  
25 It is just a means to get from one end of a market to

1 another end of a market. Isn't that right?

2 A No, it is not right, because we are interested  
3 in corridor competition in this particular context, and  
4 therefore that is what I am studying, and I think that  
5 is what the Commission has indicated is an area of  
6 competition, the corridor, and I am studying this  
7 corridor.

8 Q Well, for example, Santa Fe competes for  
9 traffic moving between your CP territory and your  
10 eastern transcontinental territory today, and competes  
11 almost entirely by routes that don't go through the  
12 central corridor. Isn't that right?

13 A The Santa Fe, yes. It goes through the  
14 Southern Corridor.

15 Q And that doesn't make Santa Fe a less  
16 effective competitor in this market, the fact that it is  
17 using a route in a different corridor, does it?

18 A We are discussing the merger of the Santa Fe  
19 and the SP and its effect on the Central Corridor, and  
20 that is what I am concerned about. The BN is there. It  
21 is not changing.

22 There is no change on the Northern Corridor,  
23 and therefore I am not discussing the Northern  
24 Corridor. In this footnote, I am discussing the effect  
25 of the BN in this territory. And it has 7.5 percent of



1 the originated traffic, and I say that is incidental to  
2 it, and it is not sufficient to affect my analysis.

3 Q Are you saying that if a rail carrier competes  
4 for traffic in a market via a different corridor, that  
5 it is not an effective competitor?

6 A I don't think my footnote goes to that point.  
7 My footnote was merely describing the presence of the  
8 BN. I am not -- I don't think I am discussing the  
9 effects of competition in this footnote.

10 Q Well, you call it an incidental competitor.  
11 You say it is of relatively minor significance, and you  
12 say the reason is because it has a route in a different  
13 corridor, and I don't understand that at all.

14 Now, are you saying that if a railroad has a  
15 route in a different corridor, it is not an effective  
16 competitor in a market?

17 A I did not say that. I think my footnote  
18 states that this is within the context of the  
19 description of the traffic universe that I am  
20 discussing, and I say that in the universe that I am  
21 discussing in this particular area from the CP  
22 territory, the BN only originates 7.5 percent.

23 And if you are going to discuss competition, I  
24 think perhaps I can answer your question more directly,  
25 but I think your questions were in the context of this

1 footnote as to what I was trying to say in this  
2 footnote. And in this footnote --

3 Q And you dismiss the Burlington Northern from  
4 your analysis, after this footnote you no longer  
5 consider the Burlington Northern as having any effect  
6 upon competition in the traffic that you studied. Is  
7 that right?

8 A It does not have any effect on traffic and  
9 competition for traffic in the Central Corridor.

10 Q All right. So that we can understand what the  
11 scope of your testimony is, your testimony doesn't tell  
12 us anything about competition that any railroad could  
13 provide via any other corridor other than the Central  
14 Corridor. Is that right?

15 A The effect upon the Central and Southern  
16 Corridors, because of the two carriers in question, go  
17 through the Central and Southern Corridors. My  
18 testimony does not deal with the Northern Corridor.

19 Q All right. Sir, at the bottom of Page 2 and  
20 the top of Page 3, you conclude that the SPSF merger  
21 would be unacceptably anticompetitive, and you list two  
22 reasons. The first is that the SPSF merger would reduce  
23 the number of carriers serving the CP territory. Santa  
24 Fe does not directly serve western Oregon, northeast  
25 California, Nevada, or Utah today, does it?

1 A No, it serves southern California and central  
2 California.

3 Q So the actual number of railroads serving this  
4 area would remain at two primary serving railroads, the  
5 Southern Pacific and the Burlington Northern, along with  
6 the Union Pacific to the extent it can get into the  
7 area, and the trucking companies that can provide  
8 options to shippers.

9 Is that right?

10 A In the territories where the Santa Fe does not  
11 serve, no, there will be no reduction in the geographic  
12 area where the Santa Fe does not have trackage. But I  
13 refer to this with regard to the routes, and therefore  
14 there will be a lessening of the number of carriers in  
15 the routes.

16 Q In fact, sir, why isn't the extension of the  
17 Santa Fe system into Nevada, Utah, and Oregon an end to  
18 end aspect of this merger?

19 A With regard to the Santa Fe alone, the Santa  
20 Fe system, looking at it prior to the merger, you could  
21 consider that its merger with the SP would be an  
22 extension of the old Santa Fe Railroad into this  
23 territory, but it is still only one railroad. Since it  
24 is a merged railroad, I don't consider that there is  
25 another carrier, another competitive carrier in this

1 territory.

2 Q Yes, sir, I understand that, but are you  
3 agreeing that this is, from the standpoint of the Santa  
4 Fe as one of the merging carriers and the SP as another  
5 merging carrier, that that aspect of this transaction is  
6 an end to end aspect of the transaction?

7 A Wherever they are not parallel, and they go  
8 into new territories, by definition it would be vertical  
9 rather than horizontal.

10 Q And that aspect of the transaction you agree  
11 should be considered under the Department of Justice's  
12 guidelines for vertical mergers?

13 A I did not consider the territories in which it  
14 would be end to end. My analysis was based on the  
15 understanding, my own understanding that this is a very  
16 parallel merger.

17 Q Okay, but would you agree that for those  
18 aspects of the transaction that are end to end, that  
19 those aspects should be considered under guidelines for  
20 vertical mergers that both this Commission and the  
21 Department of Justice have?

22 A I would not presume to advise the Department  
23 of Justice as to which part of the systems they should  
24 define as vertical or horizontal.

25 Q No, I am not asking you to do that. I am

1 asking you that for those parts of the merger that are  
2 end to end, would you agree that it is appropriate to  
3 use vertical merger guideline policies?

4 A I would only say, be my guest. They are free  
5 to do so.

6 Q Did you look separately at Santa Fe's present  
7 market shares of traffic moving to and from Oregon and  
8 northern California north of the San Francisco Bay  
9 area?

10 A No, I did not.

11 Q The Reebie market share data shows that Santa  
12 Fe's share of this traffic generally ranges from about  
13 one-half a percent to about 3 percent in almost all of  
14 these markets. Do those market shares sound about right  
15 to you?

16 A I don't know whether they are right or wrong,  
17 but I think the reason that is relevant is, the element  
18 in my statement which shows the amount of interchange  
19 between the SP and the Santa Fe, and if this is, say,  
20 territory primarily served at present by the SP, then I  
21 would presume the Santa Fe market would be very small,  
22 because these two carriers, being highly competitive,  
23 have very little interchange between them.

24 Q Well, from the standpoint of a market share  
25 type of analysis of the increase in competition from

1 northeast California and Oregon, incremental increase of  
2 market share of only 1 to 3 percent is going to be  
3 insignificant, isn't it?  
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1           A     That would be insignificant, but I did not  
2 study the market share of the SP or Santa Fe systems  
3 alone following the merger. I was only interested in  
4 the combined market share of the SFSP.

5           Q     You also referred to the fact that the number  
6 of carriers serving North Central California would be  
7 reduced by one in eight counties.

8                     It's true, isn't it, that Union Pacific could  
9 still directly serve five of those eight counties  
10 through its Western Pacific subsidiary?

11          A     I don't have the exact page where I discuss  
12 those counties, but I would accept that the Union  
13 Pacific does go into those territories, but I think my  
14 statement is explanatory of the relationship of the UP  
15 and the Santa Fe SP following merger.

16                     And therefore, the question would be the  
17 corridors that are affected.

18          Q     Yes, sir; I understand that. We will get to  
19 your theory about that relationship a little later on.

20                     Would you also agree that Union Pacific could  
21 continue to serve via rail TOFC service all of the areas  
22 in all eight of the counties where the number of rail  
23 competitors are reduced by one?

24          A     Depending upon the distance from gathering  
25 area to rail head, yes. I think that would be a

1 reasonable assumption.

2 Q We have had a number of witnesses in this  
3 proceeding state that, in general, one rail TOFC ramp is  
4 competitive with another if they are within about 120  
5 miles of one another.

6 Would that seem to you to be a reasonable  
7 radius of competition for rail TOFC service in this  
8 area?

9 A In different parts of the country, I would  
10 think the radii vary. Generally they are getting a  
11 little larger because of technology. It sounds  
12 reasonable to me.

13 Q Now, is Rio Grande seeking any trackage rights  
14 in the North Central California area, other than the  
15 area that is the present Western Pacific service area?

16 A I do not think so, but I think that should  
17 also be discussed with Mr. Brainard who knows the Denver  
18 Rio Grande much more intimately than I.

19 Q Now, while we're on the subject of TOFC  
20 service, I would like you to look at Table 3 of your  
21 testimony, which is right after your page 10. It seems  
22 to me that if my calculations are right, about 73  
23 percent of the traffic, it looks like, of the  
24 transcontinental traffic moving to and from the eight  
25 competing counties is in trailers or containers.



1 Is that about right?

2 A A high percentage is trailers and containers.

3 Q In addition to the competition from the Union  
4 Pacific System that would be available, do you agree  
5 with the ICC that rail TOFC and COFC traffic is highly  
6 competitive with transportation by other modes?

7 A No. I think at the present time, TOFC  
8 transportation is highly intramodal competitive, and  
9 with regard to your data, I think Table 4 indicates on  
10 the terminating traffic that non-TOFC is a much higher  
11 percentage than the originating.

12 Q The non-TOFC traffic still is less than TOFC,  
13 less than trailers and containers on Table 4, is it  
14 not?

15 A On Table 4, in the terminating traffic, the  
16 non-TOFC is considerably more than the TOFC.

17 Q Okay. But also, Table 4 indicates that  
18 terminating traffic is a very minor share of this market  
19 anyway; isn't that right?

20 A I would hesitate to label somebody's life's  
21 blood as not significant. For my railroad, it would be  
22 very high.

23 Q You mean for the Iowa Interstate Railroad?

24 A Yes.

25 Q I'm sure it would be, sir.

1           At the bottom of page 26, though, you have a  
2 statement where you observe that motor carriers have  
3 captured a substantial portion of the transportation  
4 market.

5           Could you describe those portions of the  
6 transportation market that you believe motor carriers  
7 have captured?

8           A     Where on page 26?

9           Q     The last two lines or last three lines.

10          A     I'm referring to the total transportation  
11 market. It's a general statement. And motor carriers  
12 have a very high proportion of the short haul market.

13          Q     Could you elaborate on that a little bit more  
14 in terms of, say, types of commodities, what types of  
15 commodities you think motor carriers have captured?

16          A     You're asking me a very general question which  
17 isn't specifically relevant here. But if you are  
18 referring to the generalities of the motor carrier  
19 market, short haul, high value, low density,  
20 service-type traffic, perhaps items that are subject to  
21 very high loss and damage, particularly if they are high  
22 value, so there is a general shakeout and the trucks  
23 have a very definite market area.

24          Q     Would you agree that motor carriers have  
25 captured a substantial portion of the transcontinental

1 freight transportation market as well?

2 A No, I would not agree that they have a  
3 significant portion of the --

4 Q Well, on page 28, you refer to the fact, about  
5 a third of the way down, that a significant proportion  
6 of the fresh fruit and vegetable traffic is handled by  
7 truck. That is transcontinental freight traffic, is it  
8 not?

9 A Yes. I believe the trucks have had a  
10 significant portion. They started out carrying this in  
11 refrigerated vans, and I think the more recent data which  
12 Mr. Nelson will discuss, indicates the decline in the  
13 motor carrier transportation in this market.

14 I think generally economists believe, with  
15 innovation, somebody takes a portion of a market, and  
16 then it is whittled away. The trucks innovated against  
17 the old refrigerator car, captured this market while  
18 railroads relied on ice reefers, and then the rails in  
19 recent years have reentered this market, and I do not  
20 have the data, but my impression is that the rail TOFC  
21 has a very large percentage of this market.

22 And I believe one witness in this hearing did  
23 offer the suggestion that 80 or 90 percent of the fresh  
24 fruits and vegetables market in the transcontinental  
25 territory were now rail. I believe that was the witness

1 for the UP.

2 Q Right. Well, that was Mr. Shum, the Vice  
3 President, Intermodal. And he's the same witness that  
4 said that the preponderance of perishable traffic from  
5 California moved by motor carrier.

6 Do you agree with that statement that he made  
7 also?

8 A I took that statement that he mentioned,  
9 because I had not looked at the numbers myself. And my  
10 impression is, at the present time, that the trucks take  
11 a much smaller proportion. But Mr. Nelson has more data  
12 on this.

13 Q Now, on page 30, you cite some statistics in  
14 the paragraph at the bottom of the page that obviously  
15 include TOFC and COFC traffic. Can you tell us what  
16 share the statistics you cite represent rail TOFC  
17 traffic?

18 A Are you referring to the same numbers that  
19 appear in my Table 3 where I give the figure for the  
20 county? I don't have it for the total territory. I  
21 have it for the eight counties in Table 3.

22 Q You don't have it for the total.

23 A I do not have it in front of me.

24 Q So we would not know if you excluded TOFC from  
25 your count, what the percentages of originating and

1 terminating transcontinental tonnage would be?

2 A I believe that can be taken from the enhanced  
3 waybill sample that you introduced. I don't have it  
4 here.

5 Q Do you agree, sir, with the Commission's  
6 decision to exempt from regulation rail TOFC and COFC  
7 traffic?

8 A What was the question? I'm sorry, I missed  
9 the question.

10 Q Do you agree with the Commission's decision to  
11 exempt from regulation rail TOFC and COFC traffic?

12 A I hesitate to pass judgment on the  
13 Commission. My own personal opinion is that it is in  
14 conformity with the Staggers Act, and I do think it a  
15 wise decision to allow the railroads to compete as the  
16 Staggers Act attempted.

17 Q You don't think rail TOFC or COFC traffic  
18 should be re-regulated, do you?

19 A No, I do not.

20 Q And when the Commission exempted TOFC/COFC  
21 traffic, it found that the traffic was highly  
22 competitive with motor carrier traffic, and that no one  
23 is seriously questioning the existence of vigorous  
24 competition between TOFC, COFC, and motor carrier  
25 service.

1           Would you agree that those findings are still  
2 correct today?

3           A     I agreed with the conclusion that they should  
4 deregulate. I did not read the decision, and I cannot  
5 comment on the Commission analysis. There may have been  
6 more in the analysis that I am not acquainted with.

7           Q     Well, from the standpoint of your experience  
8 in the rail industry, would you agree that there is  
9 today vigorous competition between TOFC/COFC service and  
10 motor carrier service?

11          A     I think without seeing the data, without  
12 seeing the decision, that refers to the fact that there  
13 was truck carriage of fresh fruits and vegetables by  
14 motor carrier, and the railroads reentered that market  
15 when they innovated with the TOFC.

16          They are in that market and at one point,  
17 there must have been vigorous competition. My  
18 impression is that the railroads now have this market.  
19 I would have to look at the context. I do not remember  
20 the decision. I did not read it, and I cannot comment  
21 on the analysis or the data in that decision.

22          Q     Okay. I'm speaking, sir, not necessarily of  
23 the decision and not necessarily of fresh fruits and  
24 vegetables.

25          In general, do you agree that there is

1 vigorous competition between rail TOFC/COFC service and  
2 motor carrier service throughout the Western United  
3 States?

4 A In certain short haul market and in shorter  
5 haul markets, I think there would be vigorous  
6 competition. In two markets that overlap, there is  
7 going to be an overlapping area of competition.

8 Q On page 3 of your statement, you state, about  
9 the middle of the page, that: "After the merger, SPSF  
10 would control two-thirds or more of all rail traffic in  
11 the territory."

12 Are you referring here to traffic moving to  
13 and from your CP territory?

14 A I am referring to the area outlined in the map  
15 on Figure 1 which is the territory that I am studying,  
16 the territory that I studied.

17 Q Now, in your view, would SPSF control traffic  
18 that terminated in Oregon, but originated on the Rio  
19 Grande System?

20 A That originated in Oregon but terminated on  
21 the Denver Rio Grande?

22 Q All right. Answer that question.

23 A I'm sorry. That's okay.

24 JUDGE HOPKINS: He liked that question  
25 better.

1 BY MR. WILSON: (Resuming)

2 Q My first question is, would SPSF control  
3 traffic that terminates in Oregon but originates on the  
4 Rio Grande System?

5 A If it originates on the Rio Grande System and  
6 it terminates in that territory, it would be a function  
7 of which routes are open, which routes are available.  
8 Normally, an originating carrier has a good bit of  
9 control over the traffic.

10 But if it is joint traffic with another  
11 carrier, then you would have to analyze the available  
12 routes and rates to see who has control. It is very  
13 possible that there is no route. If there were no  
14 route, then I'm not sure who would control it.

15 You can start somewhere, but you can't end.

16 Q If there were no route, traffic would move by  
17 truck; isn't that right?

18 A Not necessarily. It could move over a  
19 combination on a circuitous route if there's no other  
20 way to go. Traffic always moves in that manner if there  
21 are clearance problems. Or, if there is no route, you  
22 can have a combination of routes and pay the two  
23 locals.

24 Q Let's turn it around and let me ask you the  
25 question that you mentioned. If SPSF originated the



1 traffic in Oregon or the San Francisco Bay area, for  
2 that matter, and it terminated on the Rio Grande System,  
3 would SPSF control the traffic?

4 A They would have considerable control, and  
5 again the answer would be as in the reverse: What are  
6 the routes and rates and service that are available?

7 Q Okay. But assuming routes and rates are  
8 available, would you say that Rio Grande would control  
9 the traffic that it originates and SPSF would control  
10 the traffic that it originates?

11 A I would say merely that it has greater  
12 control, since the originating carrier supplies the  
13 equipment, deals directly with the shipper. But it can  
14 be the reverse; if the traffic is controlled by the  
15 destination, then they would have the control.

16 Each one would have to be looked on  
17 individually and each one would have to be looked upon  
18 in the context of the routes that are available and the  
19 service that's available.

20 Q I think for clarification, we ought to find  
21 out what you mean when you say a railroad controls  
22 traffic. Why don't you explain that?

23 A That's a very generic question. And when you  
24 speak to a traffic officer in controlling traffic, it is  
25 not an absolute. Generally, it refers to influence over

1 traffic. And a traffic officer can exert influence by  
2 the routes that he puts into the tariff, the rates that  
3 he puts into the tariff, his willingness to supply  
4 equipment, service solicitation, treatment of the  
5 customer, and so forth.

6 Q Okay. So it's the railroad's ability to try  
7 to influence the shipper's routing of the traffic if he  
8 decides to route by rail. Is that basically what you  
9 mean?

10 A That's an acceptable summary.

11 Q Are you aware that 74 percent of Rio Grande's  
12 gross revenues in 1983 came from traffic that either  
13 originated or terminated on the Rio Grande System?

14 A I didn't measure it, but if that is the  
15 figure.

16 Q Does that sound about right to you?

17 A Seventy-four percent of its revenue came from  
18 traffic originating on its system?

19 Q Originated or terminated.

20 A I believe that should be fairly approximate,  
21 since they are a heavy coal road, handling coal  
22 originations on their railroad, so that the proportions  
23 would be reasonable.

24 Q Would you say that even a higher percentage of  
25 their net profits from continuing operations come from

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1 this traffic?

2 A I do not know anything about their cost  
3 structure, so I cannot comment on that.

4 Q Well, from what you know of railroad traffic,  
5 isn't it true that a railroad generally makes more  
6 profits on the traffic that it originates or terminates,  
7 as opposed to traffic where it's only an overhead  
8 carrier?

9 A No. I would hesitate to say that, since I  
10 know of one very profitable railroad that makes -- when  
11 I did study it, it made more money on its overhead  
12 traffic than on either the traffic that originated or  
13 terminated.

14 I think it's a question of management,  
15 commodity structure, route structure. I don't think  
16 there are rules that you can apply there.

17 Q Is that railroad the North Western that you  
18 mentioned?

19 A No. It was not. It was the old Frisco  
20 Railroad.

21 Q Now, do you know how much of the traffic that  
22 originates or terminates on the Rio Grande Railroad, Rio  
23 Grande controls today?

24 A I think in the context of a definition of a  
25 control, I don't think I can answer that question.

1 Control has so many variables to it.

2 Q Well, could you estimate? Would you say that  
3 over half of the traffic that originates or terminates  
4 on the Rio Grande is traffic that Rio Grande controls  
5 today?

6 A I think in the context of control, as to the  
7 derivation of how control is reached, you would have to  
8 ask a traffic officer of the Denver Rio Grande to  
9 comment on what he thinks they have.

10 I would hesitate to express an opinion as to  
11 the control that the operators of the Denver Rio Grande  
12 have.

13 Q Okay. On page 25, you refer to coal traffic  
14 that is handled by the Rio Grande. Does most of this  
15 coal traffic originate on the Rio Grande System?

16 A That is what I was referring to on page 26.

17 Q Does most of it originate on the Rio Grande  
18 System?

19 A I'm not sufficiently acquainted. I believe  
20 the bulk of it does, but I think they also carry some  
21 traffic that is originated by a short line connecting  
22 carrier, but I am not certain of that.

23 Q Now, from the standpoint of how railroads deal  
24 with each other, given the fact that Rio Grande controls  
25 a substantial volume of traffic, originates and

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1 terminates a lot of traffic, including coal traffic, if  
2 SPSF after the merger were to decide to close an Ogden  
3 route on a given volume of traffic, couldn't Rio Grande  
4 respond by threatening to shift some of the traffic it  
5 controls away from the SPSF System?

6 A Little railroads have a great deal of  
7 difficulty influencing big railroads.

8 Q That's true. But we're not talking about a  
9 typical little railroad.

10 MR. VON SALZEN: Excuse me.

11 JUDGE HOPKINS: He had not finished his  
12 answer. Let him finish his answer.

13 THE WITNESS: I find it difficult to see how a  
14 relatively small railroad can stand up to the power of a  
15 combined SPSF and threaten them with anything.

16 BY MR. WILSON: (Resuming)

17 Q Given the market situation, you would agree  
18 that a railroad originating a substantial amount of  
19 traffic can attempt to shift that away from another  
20 gateway in response to some other problem, some other  
21 competitive problem in another area?

22 A Perhaps in the interest of ulterior motives  
23 and overriding considerations, they would be willing to  
24 make that sacrifice of giving up some traffic which they  
25 probably can substitute for through their other

1 connections.

2 Q In any event, given your definition of  
3 control, it's the shippers who are routing the traffic  
4 anyway, and so it's possible that neither Rio Grande nor  
5 SPSF could actually do what they wanted in terms of  
6 closing gateways.

7 A I don't think I said anything about who was  
8 routing the traffic. You did not ask me anything about  
9 the shippers routing the traffic. We were discussing,  
10 in terms of control, the control of the railroad and I  
11 specifically stated that the railroad that controlled  
12 the routing and the rates was exercising control.

13 And in the context that we are discussing  
14 here, the SFSP controls the routes and therefore can  
15 control this traffic.

16 Q Out of this two-thirds of the traffic in your  
17 area that you say SPSF would control after the merger,  
18 how much of this traffic would you say that Southern  
19 Pacific by itself controls today?

20 A I think those numbers are in my statement as  
21 to what proportion of the market the SF has and what  
22 proportion the SP has. And I cannot refer to it. I  
23 think it was in the traffic universe -- it should be  
24 somewhere around page 7 where I discuss that.

25 Q Probably page 9.

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1 A Thank you. The top of page 9.

2 Q And so you would say that SP controls the  
3 traffic that it's originating in CP territory today; is  
4 that right?

5 A The SP?

6 Q Yes.

7 A Well, the SP is -- it has 42 percent, but at  
8 the present time the SP has a competitor in the Santa  
9 Fe, and therefore the control that you are referring to  
10 is much less than the control that I am referring to in  
11 this territory where they together control 73 percent.

12 And there is the diminution of competition  
13 which allows the real control to occur.

14 Q Well, if we're looking at Oregon, I believe we  
15 agreed that to and from Oregon on transcontinental  
16 movements, the SP does not have a competitor in the  
17 Santa Fe, because Santa Fe doesn't handle any of that  
18 traffic to speak of.

19 Now, in that area, how much of that traffic  
20 does SP control today, just to and from Oregon, for  
21 example?

22 A I'm not sure I have the data on the proportion  
23 of originations in this territory of SP alone. But I  
24 think if you look at Table 2, it shows the Oregon  
25 counties and how important they are in this territory.

1 And the combined railroad will have control over this  
2 territory, and it's the combination which gives the  
3 control over the corridor that we are referring to in my  
4 testimony.

5 Q Sir, does a railroad which controls rail  
6 traffic make monopoly profits on the movement of that  
7 traffic?

8 A Possibly yes; possibly no.

9 Q It wouldn't necessarily follow, based on your  
10 definition of control, that a railroad controlling  
11 traffic would reap monopoly profits?

12 A What is your definition? Make monopoly  
13 profits. I'm not sure what you mean by the question.

14 Q Well, in an economic sense, profits above  
15 normal competitive level.

16 A If it's a monopoly railroad, it has the power  
17 to make a monopoly profit.

18 Q Would you regard the Southern Pacific as a  
19 monopoly railroad for traffic to and from Oregon today  
20 that goes transcontinentally?

21 A At the present time, it competes in the  
22 Central Corridor, using the Denver Rio Grande. And we  
23 have two railroads serving the territory. And I'm not  
24 sure that I would say that it is a monopolist in Oregon.  
25 I would not say that it is a monopolist in Oregon.



1 Q What are the two railroads serving the  
2 territory, Burlington Northern and Southern Pacific?

3 A I'm talking about the Central Corridor over  
4 which there is now the SP in conjunction with the Denver  
5 Rio Grande, the SP in conjunction with -- well, prior to  
6 the merger, the UP; the SP in conjunction with the UP,  
7 and the Union Pacific serving the territory; whereas,  
8 after the merger and the rerouting of the traffic, we do  
9 not have the same competitors in the corridor.

10 Q Okay, sir. Well, then you are describing two  
11 railroads competing for the traffic, but they are  
12 competing via a single route. Is that right? A  
13 SP-Ogden-Rio Grande route? Is that right?

14 A Yes.

15 Q Okay. So the shippers in Oregon have only one  
16 choice. Their only choice today is the joint line  
17 SP-Rio Grande route. Is that right?

18 A No. They have a choice. Also, if the UP  
19 serves -- it depends on which territory you're referring  
20 to. Over the Ogden Gateway, the shipper has a choice,  
21 whereas after the merger, if there is no route, there is  
22 no Denver Rio Grande over the Central Pacific territory,  
23 and therefore the shipper does not have the Central  
24 Pacific territory as an alternative.

25 Q Okay. Well, I didn't understand a part of

1 your answer. What are the other choices that Oregon  
2 shippers, shipping transcontinentally, have besides the  
3 SP-Ogden-Rio Grande route?

4 A It depends on what location they are in and  
5 who serves them.

6 Q Okay. Well, depending on those factors, what  
7 would the other choices be?

8 A I would have to look at a map, at the  
9 individual units' territories there. But at the present  
10 time, from the northern California and southern Oregon  
11 territory, I would have to look at the routes.

12 You do have the SP in conjunction with the  
13 Denver Rio Grande. You have the SP carrying it directly  
14 over the Southern Corridor, and you have the SP, and in  
15 some areas you would have the Union Pacific Railroad  
16 covering the territory.

17 Q And also from Oregon, you would have the  
18 Burlington Northern?

19 A You would have the Burlington serving some of  
20 the territory, going over the northern route.

21 Q Now, sir, would you agree that for some  
22 movements, the Southern Pacific is making monopoly  
23 profits today on traffic originating in Oregon, do you  
24 think?

25 A I would hesitate to point to an area where

1 they are making a monopoly profit. I do not consider  
2 the Southern Pacific a monopolist as long as it is  
3 competing in the territory against the Santa Fe. It  
4 might be a duopolist in some territories, and an  
5 oligopolist in other territories.

6 Q Well, in what territories would you say it's a  
7 duopolist?

8 A Where it directly competes with the Santa Fe  
9 alone.

10 Q Isn't it true that duopolists, under economic  
11 theory, generally are profitable enterprises and do make  
12 some degree of supracompetitive profits on the traffic  
13 that they handle?

14 A No. That is not so. I do not agree with that.  
15 And there are plenty of areas where there are duopolists  
16 that bleed each other to death if they have the  
17 opportunity.

18 There are some areas where they compete, where  
19 they recognize their interdependence, but they still  
20 compete; as, for example, anybody who is brought up in  
21 the rail industry knows the competitiveness of the SP  
22 and the Santa Fe over the years, and, as statistically  
23 shown in the little amount of interdependence they have  
24 and how competitive they are.

25 Q Sir, on the question of whether or not

1 Southern Pacific really does control any traffic to and  
2 from Oregon today, haven't Southern Pacific traffic  
3 volumes to and from Oregon actually been declining over  
4 the past five years?

5 A Over five years?

6 Q Yes.

7 A I cannot say. I didn't look at it. I think  
8 if there is a decline from Oregon over the last five  
9 years, one would have to look at the construction  
10 market. And I think the general demand for lumber has  
11 been going down because of our depression.

12 Q Has the Southern Pacific's traffic from Oregon  
13 been declining over the last 15 years?

14 A I do not know.

15 Q Hasn't there been an increase in truck  
16 transportation of lumber and wood products out of Oregon  
17 in the past five years?

18 A If you are referring to other than a secular  
19 decline or a cyclical decline in lumber, I would suggest  
20 that there has been some decline because of changing  
21 markets and growth of other markets, so that wood from  
22 Oregon has had some competition.

23 But specialized woods from that territory for  
24 construction purposes, I would say, declined because of  
25 the cyclical decline in lumber for the housing industry.

1 So that there has been a decline there, not because of  
2 trucking.

3 Q Are you aware of the substantial growth in  
4 truck hauling of lumber and wood products of traffic  
5 from this region?

6 A I did not study that. I could not give you  
7 the truck data on lumber shipments.

8 Q Sir, do you know whether Southern Pacific is,  
9 on balance, earning revenues in excess of its costs on  
10 traffic that it carries to and from Oregon today?

11 A I could not comment on the profitability of  
12 traffic within any one railroad. I don't think data are  
13 ever published on a railroad on a regional basis or  
14 individual market basis. I could not answer that.

15 Q Now, in terms of traffic originating in Nevada  
16 or Utah, would you say that Southern Pacific controls  
17 that traffic today?

18 A No. I do not think it controls the traffic in  
19 that territory to the extent that it is the sole carrier  
20 to all markets. It carries that traffic in conjunction  
21 with other railroads on routes, and therefore it does  
22 not have control over that traffic to the extent that it  
23 carries it from origin to destination as a single  
24 carrier.

25 Q Okay. So the fact that Southern Pacific has

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1 to rely on other interline connections for effective  
2 competitive routes is a constraint on its ability to  
3 control that traffic; isn't that right?

4 A Yes. Where it participates with another  
5 carrier in a corridor, there is a constraint.

6 Q And that's the same for traffic originating in  
7 San Francisco Bay area or in Oregon, too; isn't that  
8 right?

9 A If it controls the traffic, and there are  
10 alternative routes with other carriers, that is a  
11 constraint. Yes.

12 Q And today, Southern Pacific is cooperating  
13 with the Rio Grande on traffic, say, from Nevada and  
14 Utah and handling it in interline service over Ogden;  
15 right?

16 A I gather so.

17 Q Now, is one of the reasons for that the fact  
18 that Southern Pacific single line route for  
19 transcontinental traffic would be substantially more  
20 circuitous than the Ogden route?

21 A I presume it handles it in conjunction with  
22 the Denver Rio Grande because it has an interest in  
23 doing so, and that it is a competitive route.

24 Q Well, after the merger, would not the SPSF  
25 System have substantially more circuitous and costly

1 route for Nevada-Utah traffic to handle around through  
2 the Southern Corridor, compared to handling it via Ogden  
3 and the Rio Grande?

4 A It might be a more circuitous route.  
5 Normally, if it's more circuitous, it may be more  
6 costly. On the other hand, it may be to its interest to  
7 carry it in that route and I believe it will be in its  
8 interest to carry it over that route rather than  
9 continue the routing in conjunction with the Denver Rio  
10 Grande over the Ogden Gateway.

11 Q Okay. So you believe that the SPSF System  
12 would switch that traffic to the Southern Corridor away  
13 from an interline route with the Rio Grande at Ogden; is  
14 that right?

15 A I believe it will do so; yes.

16 Q What would be the reason for it to do that?

17 A I believe the reasons for that are fairly  
18 well-outlined in my entire testimony. Are you asking me  
19 to summarize my testimony?

20 Q No.

21 To the extent that a Southern Corridor route  
22 is more costly, if SPSF had control of the traffic,  
23 wouldn't it still make more profits to handle the  
24 traffic via an efficient short haul junction route,  
25 rather than via an inefficient and more costly long haul



1 junction route?

2 A The decision of a monopolist as to what route  
3 he takes is quite different in the long run than the  
4 short run. Even if the route were a little more costly,  
5 it may be in their overall interest to maintain the  
6 routing over the more costly area because it has control  
7 of the traffic.

8 And I think if you are discussing why does a  
9 railroad prefer its long haul route, it is not only in  
10 terms of short term profits.

11 Q Sir, on page 9, you show statistics indicating  
12 percentage of rail traffic from your CP territory that  
13 was originated by various railroads.

14 Do you have a breakdown as to how much of this  
15 traffic was interline traffic?

16 A On page 9?

17 Q Yes. At the top.

18 A I believe somewhere in my testimony I discuss  
19 the amount of traffic, of the interline traffic, how  
20 much these carriers forwarded. I don't recall where it  
21 is, but I think the interchange of the SP and the SF is  
22 referred to in my testimony. I would have to look for  
23 it.

24 Q I wasn't referring to SPSF interchange. It  
25 would be an interchange with any railroad. Do you have

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1 a breakdown as to how much of the traffic that you cite  
2 origin percentages for was interline railroad traffic  
3 with some other connecting railroad?

4 A For the total region?

5 Q Yes.

6 A I do not have that. That could be found in  
7 the waybill sample, but I do not have it here.

8 Q For traffic that is interline rail traffic and  
9 for which two or more railroads are currently  
10 participating in the traffic, how do statistics showing  
11 originated traffic percentages tell you anything about  
12 market shares?

13 A If you are referring statistically, how do you  
14 measure it, if you had the total rail originations in  
15 the territory and you had the originating by carrier,  
16 that would give you the proportion that each  
17 participates in the originating.

18 You can do it terminating and you can do it in  
19 various ways for the through traffic, depending on what  
20 you are trying to indicate, whether it's a percentage of  
21 the ton miles, the car miles, the originations, or the  
22 total carloads.

23 So you have to ask the question more  
24 specifically.

25 Q What I'm getting at here, when you show

1 percentages of just traffic originations for interline  
2 rail traffic, you are completely ignoring the  
3 participation in the route of the destination carrier  
4 and any overhead carriers. That's right, isn't it?

5 A I'm not ignoring that others participate. I'm  
6 not reflecting it because I am merely referring to  
7 originations.

8 Q You are not assuming here, are you, that  
9 origin railroad has complete control over the movement,  
10 and that an overhead carrier or a destination carrier  
11 doesn't affect the rates and service that shippers get  
12 on interline rail movements?

13 A I'm not dealing with that question, so I'm not  
14 ignoring it. And it doesn't reflect it.

15 Q All right. And you are not assuming that  
16 overhead and terminating rail carriers have no effect on  
17 rail rates and service?

18 A No. At the present time, the carrier  
19 participating in the Central Corridor has a great deal of  
20 effect. It's only when it can't participate that it has  
21 no effect.

22 Q Right. And Rio Grande's effect is an overhead  
23 carrier for most of the movements that it handles in  
24 transcontinental service; right?

25 A Well, it's part of the route which is a major

1 service route for the shippers over the Central  
2 Corridor.

3 Q And that's generally as an overhead carrier?

4 A Or it could be for traffic terminating on its  
5 line, but it probably would be reflecting the  
6 participation in the route all the way to the eastern  
7 carriers, as I think is discussed in the UP decision as  
8 to its role as a competitive alternative in the Central  
9 Corridor.

10 Q Does Rio Grande's participation in the route  
11 affect rail rates and service levels?

12 A Yes.

13 Q So if you only look at rail originating  
14 statistics, you're not learning anything about the  
15 influence of overhead carriers such as the Rio Grande or  
16 any influence of terminating carriers on interline  
17 movements; isn't that right?

18 A No. I do not agree with that, because if you  
19 look at the originations, you also see who is  
20 originating the traffic and what can be done in terms of  
21 routes.

22 If the originating carrier restricts the  
23 routes that it will interchange traffic over, then it  
24 has a great deal of control over its originating  
25 traffic, as is being shown today and as is relevant to

1 the traffic over the Central Corridor.

2 Q Okay. So the reason why you think this would  
3 be relevant is that the originating carrier could close  
4 the routes?

5 A It can close the routes or it can change the  
6 service over the route. It can affect the rate over the  
7 route. It can exercise considerable restraint upon the  
8 competitiveness of the route when it's in conjunction  
9 with another carrier.

10 Q The terminating carrier, of course, could do  
11 all of those things, too; right?

12 A Yes. As witness Conrail, the terminating  
13 carrier can also close routes and reflect the routings.

14 Q And with the exception of closing routes, the  
15 overhead carrier can also affect the rates and service  
16 on the route?

17 A It can always offer not to participate; yes.  
18 I find that hard to believe, however.

19 Q Now, returning to your conclusions at the  
20 bottom of page 2 and the top of page 3, one of your  
21 other reasons why you think the SPSF merger would be  
22 anticompetitive is that it would eliminate competition  
23 via interline rail routes through the Central Corridor,  
24 which is what we were just talking about.

25 I take it that is really your primary thesis

1 here; is that right?

2 A The thesis is that there will be one fewer  
3 carrier in this territory. There will be coordinated  
4 service over the combined SFSP so that traffic at this  
5 entire corridor will be routed through the Southern  
6 Corridor, and there will be the elimination of one  
7 carrier in the Central Corridor, and so that there will  
8 be no competition over both corridors.

9 Q Well, at the bottom of page 15 and the top of  
10 page 16, you state that nothing would prevent SPSF from  
11 cooperating with Rio Grande to compete for traffic via  
12 Ogden, despite the fact that you think the routes are  
13 going to be closed.

14 Now, my first question is, you would agree,  
15 wouldn't you, that shippers are the ones who route rail  
16 traffic?

17 A Shippers route traffic over the routes that  
18 are available to them.

19 Q Okay. Would you agree that a number of Oregon  
20 shippers like Weyerhaeuser, Georgia Pacific, Roseburg  
21 Lumber, Kimberly Clark, have considerable leverage in  
22 routing of traffic from Oregon?

23 A They only have considerable leverage if they  
24 have alternatives. If there are no alternatives, their  
25 leverage is not quite zero, because they can always

1 threaten to lift up their forests and move somewhere  
2 else.

3 Q You would agree that those shippers do have  
4 leverage today, would you not?

5 A Today they do.

6 Q Now, if SPSF ever refused to respond to these  
7 shippers' demands to route via Ogden, in addition to  
8 moving their forests, these shippers could start  
9 shipping via Burlington Northern and Union Pacific  
10 routes, couldn't they?

11 A Only if they are willing to absorb the cost of  
12 trucking to those rail heads and if they can get to the  
13 same markets. But it is highly unlikely that with the  
14 few railroads that are left in this country, that if you  
15 take away a major route, any shipper will be able to get  
16 to all places.

17 And shippers, regardless of how large they  
18 are, frequently run into a railroad that is just as  
19 large and exercise just as much market power, and they  
20 can be completely frustrated in their dealing with any  
21 railroad if that railroad refuses to do something.

22 Q Aren't the big Oregon shippers National  
23 Account shippers?

24 A Some of them are.

25

1 Q Now, these are the kinds of railroads that you  
2 say at the bottom of 16 or the kinds of shippers that  
3 you say at the bottom of Page 15 have their own market  
4 power and can whipsaw carriers into rate reductions,  
5 aren't they?

6 A I didn't say those are the kinds of shippers,  
7 and in the context of this there are certain shippers  
8 who can whipsaw carriers. When there are alternate  
9 routings, they can.

10 Q Would you say in general National Account  
11 shippers would fit in this?

12 A No, I don't think you can generalize. A  
13 National Account can still be fairly localized or ship  
14 into specific markets where there are no other carriers,  
15 and I think you would have to do a one by one analysis,  
16 and the largest shipper can be completely cut off.

17 Q What do you mean by shippers having market  
18 power?

19 A Shippers having market power, they can  
20 exercise a restraint upon the carrier.

21 Q Do you mean that they could get a rate at less  
22 than a normal competitive level?

23 A No, I did not say that. I said they exercise a  
24 restraint upon the freedom of action of the carrier.  
25 The restraints can be within reasonable limits, but if



1 they can impose a restraint, it means that the railroad  
2 recognizes their power and will act according to that  
3 restraint.

4 Q Would you agree that in many cases, large  
5 shippers with market power are able to get rates below  
6 normal competitive levels?

7 A I think I would have to look at that case by  
8 case. There are cases where a large shipper can  
9 exercise a sufficient restraint on market power to  
10 bargain with a railroad to get a better than average  
11 break.

12 Q How would a shipper with market power use that  
13 to whipsaw carriers into rate reductions?

14 A Merely by offering to take all of his traffic  
15 away and put it on an alternative route.

16 Q Okay. Now, can't shippers use their market  
17 power not only to get lower rates or to threaten to put  
18 traffic on another route, but to force a railroad to  
19 keep routes open?

20 A No, I do not think they have that power if the  
21 railroad knows and recognizes what the power of the  
22 shipper is. You cannot force a railroad to do that. If  
23 the railroad finds it is in its interest to do so, and I  
24 think you merely look at the Conrail route closings, and  
25 Conrail is not as big as the SFSP.

1 Q Well, Santa Fe's route closings, for example,  
2 were rescinded in many instances when shippers came in  
3 and asked for routes to be reopened. Isn't that right?

4 A I am not acquainted with the actions that  
5 occurred at that time. I think I would have to look at  
6 it. It is possible that they rescinded them when there  
7 was an alternative carrier. If there was no alternative  
8 carrier, then the carrier can listen politely or even  
9 listen impolitely and go its own way. I have seen  
10 both.

11 Q Well, the thing that is puzzling to me is that  
12 if a shipper has so much market power to get lower rates  
13 and shift all his carriers to routes, why can't he use  
14 that market power for another purpose, namely, to make  
15 sure the route stays open, so that he can continue to  
16 use his market power to get the lower rates and shift  
17 traffic around from one route to another? Why does his  
18 market power disappear at some artificial point?

19 A I don't believe I agreed with your initial  
20 part of the statement. I said he has this power only  
21 when he has alternatives. If he has no alternatives, he  
22 has no power.

23 Q And you don't think he can use the power to  
24 make sure he has alternatives?

25 A He has to have the power first to have the --

1 to make this -- to enforce it, and he only gets the  
2 power if he has alternatives. If there is only one  
3 carrier, then he has to look at a very different set of  
4 circumstances than if he has two railroads.

5 This is the entire idea of competition under  
6 the Staggers Act, to enforce competition intramodally so  
7 that the shipper has alternatives. If there are no  
8 alternatives, there is no power. It is not a  
9 competitive marketplace.

10 Q Could you -- do you know which shippers of  
11 traffic to and from Oregon have their own market power?

12 A No, I don't think I can answer that question.  
13 I know they will have, whatever power they have, they  
14 will have less of it.

15 Q Could you name shippers of traffic moving to  
16 and from your CP conditions territory in California who  
17 would have their own market power?

18 A I think my answer would be the same. Whatever  
19 there is, there will be less of it.

20 Q Ford Motor Company has an automobile assembly  
21 plant in Milpitas, California. Would Ford Motor Company  
22 be the kind of shipper that you would regard as having  
23 its own market power in dealing with railroads?

24 A The Ford Motor Company historically has had a  
25 great deal of market power. I recall the traffic

1 manager of Ford Motor Company calling all of the traffic  
2 officers in from the golf course at 2:00 o'clock on a  
3 Saturday afternoon, and they all showed up. If there is  
4 only one railroad serving the territory, it might have  
5 to be at 10:00 o'clock on Monday morning.

6 Q Well, automobile shippers in general have a  
7 great deal of market power?

8 A They are very large shippers, and I would not  
9 deprecate the importance of a larger shipper to a  
10 railroad.

11 Q Would other groups of shippers that would have  
12 a good deal of market power include the large grain  
13 brokers and grain shippers in the midwest?

14 A They have less market power than a Ford Motor  
15 Company.

16 Q But you would regard them as the kind of  
17 shippers who have market power to whipsaw carriers into  
18 rate reductions, would you not?

19 A The second largest grain company suggested  
20 that I speak to a particular railroad, because he said I  
21 can't get anywhere with them. In fact, if I show up, it  
22 will probably hurt us. So why don't you, with your  
23 little railroad, speak to the other railroad, because I  
24 can't get anywhere with them? And that is the second  
25 largest grain company in the United States.

1 Q When the second largest grain company in the  
2 United States talk to you, they talk to you with some  
3 market power, do they not?

4 A They have some market power. I listen  
5 carefully to them.

6 Q What about chemical shippers? Would you  
7 regard chemical shippers as a group of shippers that has  
8 market power in forcing railroads into rate reductions?

9 A My impression is that chemical rates are  
10 pretty high, above other commodities, and I think there  
11 could be some areas where there have been two railroads  
12 serving a chemical plant, for example, on the Gulf  
13 coast, where there is competition, and the chemical  
14 shipper has a great deal of market power, even greater  
15 if there are three, but if there is only one serving the  
16 plant, the best he can do is say, in my next expansion,  
17 I guess I will expand some place else.

18 Q Are you familiar with the statute under which  
19 the ICC and the Commission's Tariff Review and  
20 Suspension Board evaluates proposals to cancel joint  
21 line routes and rates?

22 A No, I am not.

23 Q Now, you are familiar with the procedure by  
24 which a railroad would go about cancelling a joint line  
25 rate that is publishing a 20-day notice of its proposed

1 cancellation for the public, for example?

2 A Not specifically. I presume it would merely  
3 file it as a proposal, announce it.

4 Q And are you familiar with the fact that  
5 shippers or connecting carriers could come in ten days  
6 before the effective date of that and move that the  
7 proposed joint rate cancellation be suspended by the  
8 Commission?

9 A I believe shippers have the right always to  
10 appear before the Commission, yes.

11 Q Now, assume with me that the statute governing  
12 joint route closings and rate cancellations states that  
13 the joint route closing or joint rate cancellation would  
14 be rejected by the Commission or the Commission's Tariff  
15 Review and Suspension Board if the action is found to be  
16 inconsistent with the public interest.

17 Now, assuming that, would you say that the  
18 Ogden joint route closings that you are concerned about  
19 here would be actions contrary to the public interest?

20 A It might be defined as contrary to the public  
21 interest, but I don't think it really would be relevant  
22 in this case, because in addition to the route you have  
23 service, you have car supply, you have the frequency of  
24 service, you have many different aspects of the rate  
25 which also must be taken into consideration along with

1 the route. There are many routes that are in the tariff  
2 on which -- through which no traffic flows.

3 Q The ICC also has jurisdiction to look at joint  
4 rate cancellations, does it not?

5 A Joint rates, but the ICC to the best of my  
6 knowledge has a great deal of difficulty in dealing with  
7 service, as witness the annual reports of the ICC for  
8 the last decade or two decades, maybe three decades or  
9 more, discussing the inadequacy of car supply for the  
10 farmers. They have never been able to force a railroad  
11 to buy a car.

12 Q Okay, sir. Focusing on the joint route and  
13 joint rate issue only, I understand you have a problem  
14 with the service aspect. If SPSF did try to close an  
15 Ogden gateway route, and that action that you speculate  
16 may occur after the merger were contrary to the public  
17 interest, wouldn't the Commission prevent it from  
18 happening?

19 A Under the terms of your assumption, the  
20 Commission could act to maintain a route. It might end  
21 up being a paper route, and that is not a route that is  
22 adequate for the shipper.

23 Q But the Commission could act to make sure that  
24 joint route wasn't cancelled and the joint rate wasn't  
25 cancelled. Isn't that right?

1           A     The result would be an increasing cost to the  
2 railroads in printing more paper, but they could do  
3 that.

4           Q     Well, sir, you aren't here prejudging what the  
5 Commission might do in a future joint route or rate  
6 cancellation case, are you?

7           A     I would hesitate to. I have lost too many  
8 cases to prejudge the Commission.

9           Q     Then, sir, from the standpoint of routes and  
10 rates, would you agree that existing law is adequate as  
11 a remedy against route closings that you speculate might  
12 occur?

13          A     I am perfectly satisfied with the new law.  
14 The new law supposedly attempts to do everything to  
15 enhance competition, and I think the Commission is  
16 studying each one of these actions in terms of  
17 competition, but the Commission can only set the  
18 environment in which competition can occur.

19                   In terms of forcing carriers to compete, it  
20 must do something more, such as the suggestion of the  
21 Denver Rio Grande or the request of the Denver Rio  
22 Grande for trackage rights through this territory.

23                   In that case, the Commission action would be  
24 publishing more than a paper rate, in that it would be  
25 providing competition.



1 Q Sir, you speak of new law. Are you aware of  
2 the rail industry efforts that involve joint route and  
3 joint rate cancellations that are under way today?

4 A No, I am not.

5 Q Wouldn't you think that an industrywide  
6 solution to the problems of joint route cancellations  
7 would provide sufficient protection to Rio Grande and to  
8 all railroads, not only from route closings by the SPSF  
9 but from route closings by any of the major railroads in  
10 the country?

11 A No, it would not. My impression from reading  
12 newspapers is that this effort is -- I would accuse it  
13 more of being a public relations activity to try to get  
14 some parts of the Staggers Act repealed, and those parts  
15 would be the parts which might affect competition, and I  
16 think the responsive action to this in this particular  
17 case is to maintain competition, not maintain  
18 publication.

19 Q Now, on Page 17, you point out that SP had to  
20 use the Central Corridor today in order to be an  
21 effective competitor to and from your CP territory since  
22 its own long haul route is too circuitous. Now, do you  
23 think that the merged system's new Southern Corridor  
24 routes, being somewhat shorter and having more traffic  
25 density, will enable the merged system to be an

1 effective competitor via these routes in many instances  
2 where Southern Pacific is not today?

3 A Well, the merger of the SFSP will give the  
4 combined carrier greater control over the traffic, and  
5 it can increase the volume of traffic so that its  
6 density will increase there, but this completely ignores  
7 the effect upon the Central Corridor and the public cost  
8 of lessened traffic there and lessened competition  
9 there.

10 So, I think your question would have to be  
11 more specific.

12 Q The question is, let's assume that the joint  
13 route is kept open on the Central Corridor with  
14 competitive rates. Now, would not the SPSF merger still  
15 create more effective competition for traffic moving  
16 between your CP territory and your eastern  
17 transcontinental territory and cause some shippers to  
18 shift their traffic to the new, more efficient routes of  
19 the SPSF system?

20 A I cannot accept that. I don't think the  
21 answer is yes. The answer is no, because the mere  
22 publication of a route does not provide competition,  
23 because there are two carriers involved in the route,  
24 and if one gives triweekly service, then that is not  
25 competitive, and provides the shipper with no viable

1 alternative.

2 Merely publication of the route and rate is  
3 not competition.

4 Q Is it your opinion then that the SPSF  
5 operating plan is wrong, and the SPSF will not be  
6 running the through trains to and through Ogden that we  
7 say we will in our testimony?

8 A I did not look at the operating plan to see  
9 what it is, but I think in the long run the SFSP will  
10 reduce that route and make it a nonservice route, either  
11 by closing the route or by reducing the service on the  
12 route, so that in effect there will be only one SFSP  
13 route, and that is through the Southern Corridor.

14 Q And that is an important predicate to your  
15 conclusion in your testimony, right?

16 A Yes, it is.

17 Q Now, if the Central Corridor route were to  
18 remain open, and service were to remain effective, would  
19 SPSF's new Southern Corridor route be an effective  
20 option for shippers in all of the CP territory that you  
21 analyzed?

22 A If the route is kept open under SFSP control?  
23 If they publish -- I am trying to get the question. If  
24 they publish the route?

25 Q If the Central Corridor route is kept open

1 with competitive service, and after the merger the SPSF  
2 has a new route through the Southern Corridor, will that  
3 new route through the Southern Corridor become an  
4 effective, a new, effective alternative for all of the  
5 shippers in your CP territory?

6 A No, I do not believe so. It would be the only  
7 route for that -- for the shippers in that territory,  
8 because I do not think the Denver SP route will be  
9 maintained, and therefore it will not be an effective  
10 route, and the only way for it to be an effective route  
11 is for the Denver to have control through to the  
12 origin.

13 Q Right, sir, but I didn't ask you to argue with  
14 my hypothesis. Why don't you assume my hypothesis with  
15 which you disagree, and I will take that, but assume  
16 that there are competitive joint routes and rates over  
17 the Central Corridor in competitive rail service.  
18 Assume that.

19 My question is, would SPSF's new route through  
20 the Southern Corridor provide a new, effective  
21 alternative for the shippers in your CP territory?

22 A I do not know what your assumptions are with  
23 regard to a competitive route. If everything is as it  
24 is now, and there are two railroads, the SF and the SP  
25 separate, then I presume the SF will have a service

1 route and a full competitive route through the  
2 territory.

3           Once they are merged, then I do not see that  
4 the same hypothesis holds, so that I cannot assume with  
5 you that this will occur, and that it will be a  
6 competitive route. If you want to build a set of  
7 assumptions --

8           Q     I can't get an answer to my question. You are  
9 just refusing outright to accept that hypothesis and  
10 answer the question. Is that right?

11           I find it difficult to find your hypothesis  
12 realistic. Perhaps if you spell it out we can go  
13 through them all.

14           Q     No, I think we are at loggerheads.

15           —     JUDGE HOPKINS: I think this might be a good  
16 time then to have a recess. We will take 15 minutes.

17           (Whereupon, a brief recess was taken.)

18           JUDGE HOPKINS: Let's get back on the record.  
19 Mr. Wilson?

20           BY MR. WILSON: (Resuming)

21           Q     Dr. Banner, could you turn to Page 17 of your  
22 verifiael statement? There you describe the practice of  
23 many shippers to seek out or tolerate alternative  
24 service even if it is less efficient in order to  
25 maintain a competitive option.

1 Do you see that, sir?

2 A Yes.

3 Q Do you think that many Oregon shippers today  
4 seek out and use Rio Grande routings as an alternative  
5 competitive service?

6 A My impression is that they use the Denver Rio  
7 Grande, but I would hesitate to compare the Denver Rio  
8 Grande with the Rock Island as I make reference in my  
9 paragraph as to inferior service. I don't think the  
10 same holds true.

11 Q Would you regard Rio Grande as one of the  
12 alternative services that many shippers would seek out  
13 in order to maintain competitive options, shippers in  
14 Oregon or --

15 A As a shipper, I would say that they would  
16 certainly look at the options, but as long as there is  
17 competition, they would probably go to their best route  
18 and utilize the best service that they can get, and I  
19 presume that using the Denver Rio Grande now is a  
20 competitive and service route.

21 When I solicited traffic for the Rock Island,  
22 things were quite different.

23 Q Would shippers from the CP territory often  
24 split their traffic and route some of their traffic on  
25 the route of one railroad and other traffic on the route

1 of another railroad to maintain competitive options?

2 A Yes, I believe that's a common practice.

3 Q Do you think that many of the California  
4 shippers are using Rio Grande service today in part  
5 because they are splitting their traffic?

6 A I would have to assume at the present time  
7 that shippers in California use the Denver route because  
8 it is an efficient route for their purposes. I have  
9 never spoken to any shipper who has told me that he is  
10 using it merely to keep the Denver Rio Grande alive.

11 Q Now, if SPSF were to maintain existing through  
12 routes and rates via Ogden and service, don't you think  
13 that many Oregon and California shippers would continue  
14 to use Rio Grande routings for the same reasons?

15 A They might route certain traffic over the  
16 route, but the existence of the SFSP as the only route  
17 through the Southern Corridor and merely allowing the  
18 Central Corridor route to exist by sufferance would not  
19 be the maintenance of competition in the Central  
20 Corridor, nor would it conform to what the Commission  
21 attempted to do in its decision in the UP-MP merger  
22 case.

23 Q Are you familiar with SPSF's joint route and  
24 rate policy as explained by Santa Fe witness Tom  
25 Fitzgerald?

1           A     No, I am not. However, regardless of what  
2 their current policy is, railroads will make decisions  
3 on the basis of what their market power is, and at the  
4 time of the merger, so that they are the only carrier,  
5 there will still be fewer carriers over these routes,  
6 and I believe whatever the policy he may have enunciated  
7 today would not necessarily hold true in the long run.

8           Q     What if the SPSF joint route and rate policy  
9 were imposed as a condition to the merger? Then it is  
10 not the sufferance of the merged carrier. It is a  
11 requirement of the Interstate Commerce Commission.

12          A     I do not think it would be preferable, and I  
13 think the only condition that would maintain the  
14 competition in the corridor would be the conditions  
15 imposed by bringing in the third carrier, the Denver Rio  
16 Grande, into this route.

17          Q     Okay, I understand you would not think it  
18 would be preferable, and the Rio Grande's solution is,  
19 in your opinion, better, but my question really goes to  
20 the shippers' ability to choose the route. They would  
21 still have the route available. They would have their  
22 competitive alternatives, wouldn't they?

23          A     If you accept all sorts of hypotheses as to  
24 what short term, long run, and everything would be,  
25 yes. But we do know that the testimony indicates or the



1 statements indicate that the joint solicitation route  
2 would not be continued, and therefore I think that the  
3 traffic over the Central Corridor would deteriorate, and  
4 would not be effective competition over the Central  
5 Corridor. The choice would have to be made by the  
6 Commission.

7 Q Excuse me. You say that some statements  
8 indicate that the Central Corridor route would not be  
9 continued.

10 A No.

11 Q Are you aware of any statements by Santa  
12 Fe-Southern Pacific witnesses that the Central Corridor  
13 route would not be continued?

14 A If I stated that, that was mistaken. I meant  
15 that the joint SP-Denver Rio Grande joint solicitation  
16 agreement would not be continued.

17 Q Okay, but you are not aware of any testimony  
18 by any Santa Fe-Southern Pacific official or witness  
19 that the competitive, cooperative relationship that is  
20 in place today over the Ogden gateway won't be continued  
21 after the merger?

22 A No, I did not say any such statement. I did  
23 not intend that. However, the operating plan that --  
24 the parts that I have read indicate that capital  
25 investment will be made on the southern route, not on

1 the central route, and therefore your hypothesis is  
2 wrong that all service would be continued.

3           The service cannot be continued in the same  
4 state as prior to merger if the capital investment  
5 programs envisaged will occur, because then service on  
6 the Central Corridor will deteriorate.

7           Q     Well, what about this hypothesis, that the  
8 capital investment plan shows investments for only three  
9 years, that the overland route has been maintained by  
10 Southern Pacific spending a lot of money on capital  
11 investment in the last couple of years, and so it is not  
12 necessary to spend further money on capital investment  
13 for the next two or three years.

14           A     I cannot comment on that, because I don't know  
15 the condition of the track, nor am I qualified to  
16 comment on track conditions even if I saw them.  
17 However, the density maps indicate a decline in density  
18 over the Central Corridor route, whereas an increased  
19 density over the Southern Corridor.

20           Therefore, I would assume that this would  
21 occur in the long run, and in the long run I do know  
22 that track pulled up or deteriorated is not put down.

23           Q     Now, the change in line density that you speak  
24 of that is put forth in applicant's testimony is based  
25 on traffic diversions from a study that assumed joint

1 routes and rates would remain open, and that competitive  
2 service would be offered over all of the routes and  
3 rates. Isn't that right?

4 A I believe that is the case. The density maps  
5 flow from the diversion analysis.

6 Q So the changes in density from the Central  
7 Corridor to the Southern Corridor that is reflected in  
8 applicants' testimony is a reflection of the improved  
9 service shippers will have on the Southern Corridor,  
10 which will cause them to shift some of their traffic to  
11 the Southern Corridor. Isn't that right?

12 A I think the joint testimony that Messrs.  
13 Nelson and I provide indicate that the diversion model  
14 is inadequate to show what really will happen, and that  
15 there will be much greater diversions to the Southern  
16 Corridor, so that the density map cannot be accepted,  
17 either, as can't the model, so there will be much  
18 greater diversions, much less density, and the Central  
19 Corridor will not conform to the hypothesis you have  
20 asked me to accept.

21 Q Now, sir, at Page 22, you state that Rio  
22 Grande's trackage rights would ensure the benefits --

23 A Excuse me. I didn't get Page 22.

24 Q Page 22. You state that Rio Grande's trackage  
25 rights would ensure the benefits of existing competition

1 will continue to accrue to the shipping public. Now, if  
2 Rio Grande were given the right to serve directly Oregon  
3 and northern California shippers that today it serves  
4 only by joint line rates and routes as an overhead  
5 carrier, wouldn't Rio Grande actually be placed in a  
6 much better competitive position if its conditions were  
7 granted than it is in today?

8 A The imposition of conditions are a response to  
9 the decline in competition. I think it is quite  
10 difficult to tailor conditions to make everything  
11 exactly as it was before. The only thing that would  
12 make it exactly as they were before would be no merger.  
13 The responsiveness of the Denver conditions cannot  
14 absolutely conform to what you are suggesting

15 -- What I do say is that these conditions will  
16 ameliorate the competitive damage that the merger will  
17 result in, and therefore the Denver coming into the  
18 territory will merely replace the carrier in the Central  
19 Corridor.

20 Q I don't think that was responsive to my  
21 question. Let me ask it again. Would not Rio Grande's  
22 receipt of these conditions place Rio Grande in a much  
23 better competitive position than the competitive  
24 position it is in today?

25 A Yes, I believe it could be construed that

1 way.

2 Q And if Rio Grande improved its competitive  
3 position, would it be at the expense of the merged  
4 railroad?

5 A No, it would not be at the expense of the  
6 merged railroad. It would merely be the correction to  
7 the decline in competition that will occur as a result  
8 of the merger, and therefore it is merely the adjustment  
9 that the Commission would make to maintain competition  
10 in the same way that the Union Pacific conditions that  
11 were laid down in that merger doesn't put Humpty-Dumpty  
12 together. It merely corrects the harm that has been  
13 done, and therefore makes the merger palatable.

14 Q Sir, you testified on behalf of the trustee of  
15 the Milwaukee Railroad in the ICC proceeding to evaluate  
16 competing offers for the Soo Line and the C&NW. Is that  
17 correct?

18 A Yes, I did.

19 Q Could you briefly describe the purpose and  
20 conclusions of your testimony in that proceeding?

21 A That is a very broad question. If I may  
22 summarize it --

23 Q Yes, please.

24 A The trustee asked me to testify as to the  
25 effect upon the public interest of the alternative plans

1 of the Soo and the C&NW.

2 Q And in that you also analyzed the effect on  
3 competition of these alternative plans?

4 A That was one of the issues of public interest,  
5 yes.

6 Q Sir, I would like to hand you a copy of one of  
7 your statements in that proceeding. I don't think it is  
8 necessary to mark it as an exhibit. I just have a  
9 couple of questions. Sir, at Page 5 of your testimony  
10 in the Milwaukee case --

11 MR. VON SALZEN: Excuse me, Mr. Wilson. Could  
12 we have a more complete description of the particular  
13 piece of testimony?

14 BY MR. WILSON: (Resuming)

15 Q Yes. At Page 5 of your first verified  
16 statement in the Milwaukee case, the statement signed  
17 by you on April 13th, 1984, you state at the top on a  
18 statement that was slightly amended by you in the  
19 hearing, as amended, you state, "Where a shipper  
20 currently is served by a single rail carrier, ICC  
21 criteria do not require that he be given greater  
22 choice."

23 Do you still agree with that statement?

24 A The context -- yes, that is my statement. The  
25 context in which that correction was made was to clarify

1 what I said, which could have been misinterpreted. A  
2 shipper can have single line service between two points  
3 by two different carriers.

4 They both can serve the origin and  
5 destination, and what I was trying to refer to in this  
6 context was a shipper that has only a single carrier  
7 serving those two points. That was the correction I  
8 made in my testimony for clarification.

9 Q Is it your opinion that a shipper who has only  
10 a single carrier serving him today is not required to  
11 have greater choice, more carriers serving him after a  
12 rail consolidation transaction?

13 A I believe the Interstate Commerce Commission  
14 policy would be that there is no necessity to interject  
15 further competition, but I think this is shorthand for  
16 the complete service, so it should be interpreted to be  
17 the corridor or the complete route, not only the plant  
18 that is served.

19 Q Sir, you also testified in that statement, I  
20 believe, that C&NW's acquisition of the Milwaukee  
21 Railroad would be in the public interest and would not  
22 be anticompetitive even though it was essentially a  
23 parallel acquisition. Is that a fair summary of your  
24 conclusion?

25 A Not quite accurate. I think I was asked the

1 effects upon competition, and I think I put it in the  
2 negative way that it would not be impermissible,  
3 particularly since there were conditions to be imposed  
4 in that acquisition.

5 Q Yes, sir, and another important fact, I  
6 believe, at the top of Page 9 you state that your reason  
7 is that effective service from alternative modes will  
8 continue to be available, which will provide a  
9 constraint on potential adverse pricing behavior.

10 What service from what alternative modes are  
11 you referring to there?

12 A I think you would have to read the statement  
13 in its context, and take the entire geographic area that  
14 was involved in this. It was a relatively small area,  
15 and the Commission recognized that for the state of Iowa  
16 there were rivers on both sides of the state, there was  
17 a highway network, and a good bit of the traffic involve  
18 in this territory was relatively short haul traffic.

19 Q Okay. Well, would you agree with me that in  
20 that statement you found that because of truck  
21 competition, truck to rail competition, and water  
22 carrier competition, the parallel merger of the C&NW and  
23 the Milwaukee was okay, not unacceptably  
24 anticompetitive?

25 A We are dealing with the balancing of actions,



1 and while there would be a decline in the number of  
2 competitors where there was parallelism, there were also  
3 great public benefits to be gained, but primarily in the  
4 context of that statement the traffic, being relatively  
5 short haul, did have truck competition in the east-west  
6 markets which carried the grain, I think is what we were  
7 referring to primarily, carried it both to the two  
8 rivers on the east, the one river on the west, the rail  
9 at Omaha and the rail at other points in the east, and  
10 there were many more carriers in the territory.

11 Q In this type of truck alternative competition,  
12 water carrier alternative competition is a prevalent  
13 thing in the handling of grain traffic from the midwest,  
14 is it not?

15 A At the time that this occurred, there had been  
16 considerable shifts in the traffic base in that the  
17 all-rail movements were primarily involved in the  
18 previous period in the export market.

19 The volatility of the export market was such  
20 that at the time of this merger, of the acquisition of  
21 the Spine Line and then the Milwaukee, the through rail  
22 movements to the Gulf had virtually disappeared, and the  
23 real markets were the east-west markets to the barge  
24 terminals and to the food processors.

25 So, I think one would have to look in the

1 context of the market to make such determinations. At  
2 the present time, given the volatility of the export  
3 market, it could very well be that that rail export  
4 market is dead forevermore.

5 Q Now, sir, I am afraid I am going to have to  
6 discuss with you for a few minutes your dual monopoly  
7 theory that you set forth on Pages 19 and 20. You state  
8 that this is the first time you know of or probably that  
9 anybody knows of that a single transaction has caused  
10 two monopolies.

11 A Are you aware of anybody ever asserting that  
12 one transaction would cause two monopolies before?

13 A Maybe they never had that condition before. I  
14 did not search the literature for it, no.

15 Q Now, you speculated, as I understand it, that  
16 Union Pacific would essentially abandon competing in the  
17 Southern Corridor against SPSF, and in return SPSF would  
18 abandon competing in the Central Corridor against the  
19 Union Pacific. Is that basically what you are  
20 predicting?

21 A That is what I am stating will probably occur  
22 in the case of duopoly.

23 Q And to me, this seems a little extreme. Why  
24 would SPSF stop competing as aggressively as it could  
25 over the Central Corridor in addition to competing as

1 hard as it could over the Southern Corridor so that it  
2 could make as much money as possible?

3 A Are you asking me to comment on your  
4 difficulty in understanding it or upon my statement?

5 A Why do you think SPSF will not compete as  
6 aggressively as it could for as much traffic as possible  
7 in both the Central Corridor and the Southern Corridor?

8 A It is going to compete for the traffic that  
9 used to go through the Central Corridor by taking it  
10 through the Southern Corridor, but it will be in their  
11 interest in a live and let live attitude that both can  
12 be better off by consciously restricting their efforts  
13 to each of the corridors in which they are the  
14 monopolists.

15 Q As I understand your alleged two-monopoly  
16 operation, it sounds a little like collusion or an  
17 allocation of territory arrangement that would be  
18 prohibited by the federal antitrust laws. Is that  
19 right?

20 A I did not say that they would get together in  
21 a hotel room and divide up the market. I merely said it  
22 would be in their interest to act in that manner, and  
23 the market structure will be such that they probably  
24 would end up acting in this manner.

25 They are each a single line carrier there, and

1 if they actually change the service over the Central  
2 Corridor, then the SFSP will be retreating from that  
3 market, and the UP will be the only carrier with through  
4 service on the Central Corridor.

5 This is the analysis from the assumptions.

6 Q Would you agree that if this arrangement were  
7 put into place, it would violate federal antitrust law?

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1 A If this occurred and the Department of Justice  
2 found that it violated the antitrust laws, yes, it would  
3 violate it, but at that point I would find it a little  
4 difficult to reposition the tracks and pull the SFSP  
5 merger apart and put the competition back in.

6 The only thing that, at the present time, will  
7 maintain, will assure the competition would be the  
8 conditions that are asked for in the Central Pacific  
9 territory.

10 Q Doesn't federal antitrust law have available a  
11 remedy of an injunction against this practice  
12 occurring?

13 A I am not an antitrust attorney.

14 Q I understand that. But you were an economist  
15 with the Senate Committee on Antitrust. And doesn't  
16 that injunction remedy exist?

17 A Economist analyze the market structure. I  
18 don't think they analyze injunctions or appeal for  
19 injunctions. They try to prevent something from  
20 happening beforehand, not look at penalties ex post.

21 Q Well, then, I guess you are not prejudging, are  
22 you, Dr. Banner, whether the courts could enjoin this  
23 kind of activity and prevent it from occurring after the  
24 merger?

25 A I would leave that for my attorney.

1 Q Okay. Now, if this merger would give Union  
2 Pacific a monopoly in the Central Corridor, as you  
3 hypothesize, why isn't Union Pacific supporting the  
4 merger instead of seeking trackage rights that Mr.  
5 Schmidt has said would stop the merger altogether?

6 A I cannot analyze the objective or the analysis  
7 of the Union Pacific management, but I believe the Union  
8 Pacific is also asking for conditions in this case. But  
9 I do not feel qualified to comment upon them.

10 Q Can I take it from your testimony that you  
11 believe that any further extensions of the Union Pacific  
12 System would only enhance UP's market power and would be  
13 anticompetitive?

14 A I don't think I am qualified to discuss that  
15 area in this context. I have not studied the Union  
16 Pacific conditions as to what the effects of those  
17 conditions would be.

18 Q Sir, on page 19, at the footnote at the bottom  
19 of the page, you point to some evidence of your theory.  
20 You say the groundwork for the dual monopoly  
21 arrangements is already in place because Santa Fe and  
22 Union Pacific agreed to reopen joint routes and rates  
23 and to reestablish reciprocal switching.

24 Now, it seems to me that these actions go in  
25 exactly the opposite direction because they increase

1 competition. And I would like for you to explain your  
2 reasoning as to why these actions make you think they  
3 are going to be two monopolies.

4 A The footnote describes a condition being put  
5 into effect from which, based upon which those actions  
6 can be taken. You can interpret the agreements in one  
7 way, but my feeling is that the agreements allow  
8 something to take place.

9 And we are dealing here with how to prevent  
10 taking advantage of such agreements. And I suggest that  
11 the only way to prevent the deleterious interpretation  
12 is to make certain there is another competitor.

13 Q Well, sir, Santa Fe has entered into the same  
14 agreements to reopen joint routes and rates with other  
15 railroads -- Burlington Northern, Tex Mex, Norfolk  
16 Southern.

17 You're not suggesting, are you, that the  
18 ground work for monopolies is being formed in those  
19 agreements?

20 A I am not in any case here saying what their  
21 ulterior purpose is. I am discussing the structure.  
22 The structure put in place in this particular case would  
23 allow this to occur.

24 We do not deal with the sufferance of the  
25 Santa Fe in making agreements, but what will be the

1 effect on market structure. The effect on market  
2 structure in this case is that it will allow a sharing  
3 of the market, and there will be nothing in the structure  
4 to prevent this from occurring.

5 And we are dealing here with what can happen  
6 as a result of this merger, and we are trying to suggest  
7 conditions under which the merger will not result in a  
8 lessening of competition.

9 Q Okay. I would like to turn now to your  
10 November verified statement where I have some questions,  
11 and I'd like to start, first, with your Part 3 where you  
12 discuss the attitudes of shippers in the case.

13 In preparing your verified statement --

14 A Excuse me. Is that page --

15 Q Page 19 is where that discussion begins.

16 A Yes.

17 Q In preparing your verified statement, did you  
18 read the 332 shipper verified statements that support  
19 the SPSF merger?

20 A No, I did not. I did not read them all. I  
21 went to the SP-Denver submissions, and I only looked for  
22 those cases where shippers testified in both.

23 Q So you only read the 49 statements of shippers  
24 who testified in both, that you refer to at the top of  
25 page 20; is that right?



1 A Yes.

2 Q Okay. And that's the same with the Rio Grande  
3 conditions shippers, is it not?

4 A That's correct. I think I may have read one  
5 or two in other cases, merely to see what they were  
6 doing.

7 Q Among these 49 shippers, did you make any  
8 notes or tallies of how many shippers supporting the Rio  
9 Grande conditions did so for one reason as opposed to  
10 how many did so for some other reason?

11 A No. I made no tallies. I found in reading  
12 them that there was a rather consistent explanation in  
13 all of the testimony given in support of the Denver  
14 conditions. That is, their fear as to what would happen  
15 to the Central Corridor and the necessity for  
16 maintaining competition in the Central Corridor by the  
17 granting of these particular conditions.

18 Q In fact, did you find in reading them that the  
19 consistent explanation went so far as to be identical  
20 wording in many of these statements?

21 A No, I did not pick that up.

22 Q Is it correct that the references to shippers  
23 on pages 19 to 22 of your testimony refer only to the 49  
24 shippers that you studied and not to all of the shippers  
25 supporting the Rio Grande's conditions?

1           A     That is correct. Only the 49. I did not look  
2 at the others because I was interested in the  
3 competitive situation, and the competitive situation was  
4 those shippers tht were in both.

5           Q     Sir, at the bottom of page 1 of your  
6 testimony, you state that you reviewed the statements of  
7 affected shippers, who recognized the need for the  
8 efficiencies of the proposed merger.

9           A     I'm sorry. Page 1 of --

10          Q     Yes. Near the bottom of the page. You say  
11 you reviewed the statements of the shippers who  
12 recognized the need for the efficiencies of the proposed  
13 merger.

14                Which efficiencies of the SPSF merger are you  
15 referring to there?

16          A     The claimed efficiencies, which included the  
17 single line service, car supply, responsiveness, the  
18 various elements in the Kearney study. In that, I found  
19 also a very great similarity in their support for the  
20 SP. I did find quite consistent statements on their  
21 part, using the same words.

22          Q     So you're referring to the nine benefits that  
23 are listed at the bottom of page 7 and the top of page  
24 8, the efficiencies that the shippers would receive from  
25 the merger; is that right?

1           A     The efficiencies, as outlined by the Kearney  
2 study, which all the shippers seem to have picked up all  
3 of them.

4           Q     Now, why -- you used the word "need" for the  
5 efficiencies; that the shippers recognized the need for  
6 these efficiencies. Why do shippers need the  
7 efficiencies that the SPSF merger will result in?

8           A     Is that on page 1?

9           Q     Yes.

10          A     I think the need is for the two, the service  
11 efficiencies of the -- the combination -- I'm sorry --  
12 the combination of need for merger, together with  
13 maintenance of competitive pressures. That is what I  
14 meant by the use of "need."

15          Q     How important to a shipper is the financial  
16 ability of its serving railroad?

17          A     It is important if the shipper is making a  
18 considerable investment so that the transportation  
19 service will not disappear before his investment is  
20 utilized and used up.

21                 If he stuck with a very large investment and  
22 he doesn't have rail service, I would say there is need  
23 for service.

24          Q     During your time with the Rock Island  
25 Railroad, did a number of shippers indicate to you that

1 they were concerned about the financial health of the  
2 railroad and its ability to continue in business?

3 A They certainly did, and they did everything  
4 possible, including lending us money, to keep us in  
5 business.

6 Q And could you list some of the reasons why the  
7 Rock Island shippers were so concerned about the  
8 financial health of the Rock Island?

9 A They were dependent upon rail transportation.  
10 They felt that if the Rock Island went out of existence,  
11 there was a great possibility that there would be no  
12 rail service. They would maintain substantial losses,  
13 as for example, a shipper whom I am well acquainted with  
14 testified, that his facility had a \$4 million investment  
15 that was of his own personal funds and if there was no  
16 rail service, the next day that facility would be worth  
17 only \$2 million.

18 Q Okay, sir. Now, during your view of  
19 Applicants' supporting statements, the 49 statements that  
20 you looked at, did you notice the same type of concern  
21 being expressed by shippers about the future financial  
22 condition of the Southern Pacific?

23 A I didn't read them so thoroughly that I felt  
24 that -- I do not recall their fear that the Southern  
25 Pacific would disappear. And in retrospect, the

1 analysis of the Rock Island indicates that service was  
2 picked up after a while, not in as good a fashion, but  
3 very little track was abandoned.

4 Q At the bottom of page 22, you state that you  
5 think the Commission should heed the concerns of  
6 affected shippers in this proceeding.

7 Now, assuming with me that over 100 shippers  
8 stated their concern about the financial position of  
9 Southern Pacific and whether it will be able to continue  
10 to operate if, for some reason, the conditions imposed  
11 on this merger are too onerous, would you agree that  
12 that is the type of concern the Commission ought to be  
13 considering?

14 A I presume that the Commission considered that,  
15 but I do not recall that the Southern Pacific witnesses  
16 raised any fear that the Southern Pacific was going to  
17 go out of business as a rail carrier.

18 Q Sir, were you involved in soliciting or  
19 obtaining the shipper support statements for the Rio  
20 Grande proposals?

21 A No, I was not.

22 Q Do you know who was involved in soliciting or  
23 obtaining shipper support statements?

24 A No, I do not.

25 Q Did you talk to any Rio Grande traffic

1 officers about how many employees were involved in  
2 obtaining the shippers' support?

3 A No, I did not.

4 Q Did you talk to any Rio Grande traffic  
5 officers about any aspect of Rio Grande shipper support?

6 A No, I do not recall speaking to them of that  
7 at all.

8 Q In connection with preparing this statement,  
9 did you personally contact any of the 49 shippers that  
10 you list in your Appendix A?

11 A No, I did not.

12 Q Did you review any correspondence from any of  
13 these shippers or any shippers to Rio Grande about  
14 either the SPSF merger or about Rio Grande's proposed  
15 conditions?

16 A No.

17 Q Is it fair to say that the excerpts of the 49  
18 shippers' statements that you set out in your Appendix A  
19 are the basis upon which your conclusions are developed?

20 A They are the basis of my conclusions as to  
21 what they said and what their fears were; yes.

22 Q Isn't it correct that some of the 49 shippers  
23 expressly state that their competitive problems would be  
24 solved with the traffic routing condition via Ogden, and  
25 that Rio Grande's conditions really aren't necessary?

1           A     I do not recall that being their conclusion. I  
2 believe some stated that they wished protective  
3 conditions imposed to maintain their routes, but the  
4 interpretation of what protective conditions were  
5 sufficient, they didn't go into.

6           And, frankly, I'm not sure that the are  
7 sufficiently qualified to say what one condition is  
8 rather than another. I think that's an economic  
9 argument.

10          Q     But it is true that, say for example, many of  
11 the Rio Grande supporting shippers simply said we want  
12 competition maintained in the Central Corridor and let  
13 it go at that; isn't that right?

14          A     Yes. They said that. But it is up to the  
15 Commission to decide how that competition will be  
16 maintained and what is necessary to maintain that  
17 competition.

18          Q     Okay. Now, sir, in your testimony, you only  
19 cite two shippers. I guess I'll ask you about both of  
20 them. The first one I'd like to ask you about is your  
21 citation to Richard Haupt of Ford Motor Company.

22                 You cite him specifically and describe him as  
23 having a view that is representative of the view of all  
24 of the shippers that you looked at, at the bottom of  
25 page 21.

1           What do you mean by the term "representative"?

2           A     Well, Mr. Haupt is an articulate person, and I  
3 think he summarized what these various shippers had put  
4 into their statements.

5           Q     Would you say that Mr. Haupt's views generally  
6 expressed those of all the Rio Grande shippers who would  
7 be affected by the SPSF merger?

8           A     No. I cannot say that. I can only represent  
9 that it was representative of those shippers' statements  
10 that I read, and reflected their competitive concerns.

11          Q     Sir, you quote extensively from his statement,  
12 and also in Appendix B you do also, but you leave off  
13 the last line of his statement which says -- after he  
14 says, "For it supports Rio Grande's acquisition of  
15 trackage rights," he states: "Alternatively, assurance  
16 from the Santa Fe Southern Pacific that existing  
17 gateways will remain open to ensure fully competitive  
18 main line service in this corridor will meet our needs  
19 as a shipper for rail service choices."

20          A     Sir, would you agree with Mr. Haupt, your  
21 representative shipper, that a firm commitment to  
22 maintain joint line rates and routes would meet the  
23 needs of all the shippers who are supporting Rio  
24 Grande's conditions in this case?

25          A     No, I do not.



1 Q Sir, at the bottom of page 20, you point out  
2 that the filing of a supporting statement by a shipper  
3 could be only "a frivolous or a friendly act."

4 Do you consider a statement supporting Rio  
5 Grande's conditions that does not identify any potential  
6 competitive harm to the shipper as a result of the SPSF  
7 merger to be a frivolous statement?

8 A I don't think you are reading it in context.  
9 I asked why does he do this? I think I set up a  
10 strawman, saying it could be frivolous or friendly, but  
11 I don't think that's the case. I think they are serious.

12 So my use of the word "frivolous" in the  
13 strawman category.

14 Q You don't think of the shipper testimony in  
15 this case is the result of frivolous or friendly acts?

16 A Shippers are very serious people to me in the  
17 context in which I deal with them, and I do not think  
18 they are frivolous. They were concerned about this, and  
19 therefore they took time and effort to submit something  
20 to the Commission, and therefore I think they were  
21 serious and they should be regarded seriously.

22 Q On page 21 of your verified statement, you  
23 state that some shippers expressed specific concerns  
24 about the merger and cite as your example for that Mr.  
25 Thomas Pfeifer from Kohler Company.

1           Isn't it in fact true that Mr. Pfeifer's  
2           verified statement doesn't even mention the SPSF merger  
3           or any potential --

4           A       Mr. Pfeifer says something which no one else  
5           had brought out, but which I felt had very strong public  
6           interest issues. And that is the existence of no  
7           competition in an area will have an impact on that  
8           particular area in industrial location.

9           And therefore, in those counties where there  
10          will be fewer railroads, there will be much less  
11          incentive for new location of industrial plants. And  
12          therefore, I thought those counties should be taken --  
13          they should have a great interest. And, from a public  
14          interest standpoint, the Commission should have an  
15          interest as well.

16          Q       Haven't a large number of shippers located  
17          their facilities on lines served exclusively by a single  
18          railroad in order to get the benefits of the economics  
19          of having only one railroad handle their traffic?

20          A       No. I think that is contrary to my  
21          experience. My experience has been that shippers will  
22          do everything possible to locate where there are two or  
23          more railroads, so that they will have the advantages of  
24          competition in transportation.

25          Q       Sir, could you tell me what is the source of

1 your rail revenue per ton mile statistics on page 6?

2 A I believe that is the Applicants' augmented 1  
3 percent waybill. Not 1 percent; the Applicants'  
4 augmented waybill sample.

5 Q This would be all of the traffic handled in  
6 that waybill sample, not just traffic handled by Santa  
7 Fe or Southern Pacific, or not just traffic moving in  
8 certain specific markets; is that right?

9 A I believe it was the traffic in the CP  
10 territory, as outlined in my statement.

11 Q Do you know whether railroad costs of  
12 transporting sulfuric acid, one of your examples, are  
13 higher than costs of transporting paint?

14 A In order to say whether they're different, you  
15 would have to look at the type of car, the distance.  
16 But this is the average for all of the particular  
17 traffic moving in this particular comparable traffic  
18 volume.

19 Q Did you make any study of the average length  
20 of haul of the four commodities that you list here on  
21 page 6?

22 A No, I did not. I took the total.

23 Q Don't rail costs per ton mile increase when  
24 the hauls are shorter hauls?

25 A I'm sorry. Did you say rail?

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1 Q Don't rail costs per ton mile increase where  
2 shipments are hauled shorter distances, as a general  
3 rule?

4 A As a general rule, I believe you are correct.

5 Q Don't rail costs per ton mile vary with the  
6 size of the shipments involved?

7 A Yes, they do.

8 Q Did you make any study of whether the size of  
9 the shipments involved and handled by Santa Fe and  
10 Southern Pacific differ or are the same?

11 A I did not. But since this was for the entire  
12 territory, I made the assumption that this was a  
13 universe that I compared the data within.

14 Q Sir, on page 5, you observe that railroads  
15 price their transportation of different commodities  
16 differently. Don't railroads also price their  
17 transportation of the same commodity differently based  
18 on, for example, the specific origin or destination of  
19 the movement?

20 A I believe historically that has been the case,  
21 except where there are mileage scales.

22 Q And railroads would also price their  
23 transportation of the same commodity differently, based  
24 on some other factors, such as the length of haul of the  
25 shipment; is that not right?

1 A Yes. Mileage is an element in rates.

2 Q What about the bargaining power of the  
3 shipper? Is that a factor?

4 A Yes, it is.

5 Q The time of the year could have something to  
6 do with different prices for the same commodity, could  
7 it not?

8 A There are not too many seasonal rates,  
9 although under the Staggers Act which attempted to  
10 infuse more competition into rail markets, that  
11 permission was not only given, but it was suggested that  
12 railroads attempt to be more competition intramodally by  
13 going in for seasonal rates.

14 Q Would prices for the same commodity also vary  
15 on the basis of the need to keep a shipper competitive  
16 in his market so that the traffic would move?

17 A Yes.

18 Q Would prices for the same commodity vary on  
19 the basis of the volume of the traffic which the shipper  
20 is offering for the shipment?

21 A We do have quantity rates, rates that vary  
22 with the number of cars and with the volume annually,  
23 and in general with the total volume of traffic which  
24 will affect the market that the railroad is operating  
25 in.

1 Q Would prices for the shipment of the same  
2 commodity vary on the basis of whether the railroad  
3 owned the equipment that was supplied for the move?

4 A Yes. Generally, they vary either in the form  
5 that if the shipper supplies his own equipment, an  
6 allowance is given for that equipment, or in some cases,  
7 separate rates are offered for rail-owned equipment or  
8 shipper-owned equipment.

9 Supposedly, the supplier of the equipment can  
10 be compensated for the supply, for supplying this  
11 equipment.

12 Q Would prices of the same commodity also vary  
13 on the basis of whether other special rail services were  
14 offered, such as special switching services or pallets  
15 in the car, that sort of thing?

16 A I believe this is common. You would have to  
17 discuss each one individually to see how they apply, but  
18 prices for individual services are included in tariffs.

19 Q Other than all of these factors we have gone  
20 through, do you know of any other factors, sir, which  
21 would cause railroad prices of the same commodity to  
22 vary?

23 A I think we enumerated very many already. And  
24 there may be more in individual circumstances. So that  
25 there are many factors affecting the price for

1 transportation and the cost for transportation.

2 Q Given all of these pricing differences, even  
3 for transportation of a single commodity, wouldn't  
4 reliance upon price to determine a definition for the  
5 competitive impacts of a merger, lead you to look at  
6 each individual movement as a separate market?

7 A No. You look at the individual movement for  
8 the effect on that movement, but you can look at the  
9 totality for its effect upon the entire service  
10 territory. I don't know how else you would consider  
11 that.

12 Q In other words, you do have to do some  
13 aggregating to try to look at the impacts on a realistic  
14 transportation market?

15 A Some aggregation, yes. But you may aggregate  
16 for some purposes, but for analysis you may have to go  
17 back to the individual movement.

18 Q To the extent that railroads engage in value  
19 of service pricing of freight traffic, don't competing  
20 trucks and water carriers do the same thing?

21 A In the context in which you state it, I would  
22 say that the entire economy works in that manner, and  
23 therefore I cannot deviate from your description of the  
24 marketplace.

25 Q Now, isn't it more important to look at not

1 whether the prices of given commodities differ, but  
2 whether the prices of the commodities or of the service  
3 are likely to vary about the same amount on the basis of  
4 supply and demand when you're trying to decide what is  
5 an appropriate market?

6 A I'm not sure I understand your question.  
7 Appropriate for what?

8 Q For an analysis of anticompetitive effects of  
9 a rail consolidation let's say.

10 A I have difficulty with the question.

11 Q Isn't the thing to focus on not whether the  
12 price of the service is different or the price of the  
13 service for a commodity is different, but whether the  
14 prices would vary by a different amount, based on a  
15 change of demand or based on a change of competition  
16 when you're trying to --

17 A That would be an element to look at; yes.

18 Q Given all of the variations in prices charged  
19 for rail movements, wouldn't you say that type of rail  
20 service offered is a better criteria for defining your  
21 markets?

22 A No. I am looking in this context at the  
23 aggregate of all the services performed. And if you have  
24 a specific problem, then you break down the aggregate to  
25 look at the specific problem. I do not understand the



1 difference that you're trying to make, so I can't answer  
2 your question more specifically.

3 Q At the bottom of page 16, going onto the top  
4 of page 15, you state that your own experience with  
5 merged carriers has been that they do anticompetitive  
6 things.

7 What merged carriers are you referring to here?

8 A At the bottom of page 15?

9 Q Sixteen, carrying over to page 17. My  
10 question is, what are the merged carriers that you refer  
11 to?

12 A In my dealings to determine their  
13 responsiveness? Oh, I could give you the example of --  
14 well, let's see -- right at the moment, the Chessie  
15 System. I am having a great deal of difficulty getting  
16 a responsive letter from their law department; whereas,  
17 if there were two railroads that I could do business  
18 with, I'm quite sure calling up the traffic officer  
19 would get me a response very fast.

20 I found that to be the case when I was on  
21 Southern Railway, and I've heard the same has been true  
22 in dealing with the BN in some territories. It sometimes  
23 takes about a year to get a response.

24 Q It's not your view, is it, that the mergers  
25 that created these systems are anticompetitive or

1 contrary to the public interest?

2 A Well, the mergers which created these, I  
3 think, were reviewed by the Commission and conditions  
4 were placed in each instance. But even sometimes with  
5 conditions, there are vestigial remnants that slip over  
6 into some activity, such as the responsiveness of the  
7 law department that I'm dealing with now.

8 Q Responsiveness of the law department may not  
9 depend on whether the carrier has merged, sir.

10 A That may be --

11 Q At the top of page 3 of your verified  
12 statement, you list a number of types of traffic which  
13 you describe as rail-dependent. What do you mean when  
14 you call something a rail-dependent commodity?

15 A A rail-dependent commodity in this context is  
16 that a great proportion of the commodities to be  
17 transported use railroad.

18 Q Okay. One of the commodities you list there  
19 is cotton, you see at the top of page 3. Doesn't Mr.  
20 Rhodes' testimony show that the rail market share for  
21 cotton is only 10 percent, and that it's been declining  
22 for the past 20 years?

23 A I don't recall that Mr. Rhodes said 10  
24 percent. But if you take the territory that we are  
25 concerned with, the transcontinental territory, I think

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1 market share -- the rail market share of the cotton  
2 industry is considerably more.

3 I would say that it is probably in excess of  
4 70 percent or 60 percent; that is, the territory from  
5 Arizona, California, to the southeast, which is the  
6 market we are talking about.

7 You may recall I did not deal with, or I  
8 specifically exempted movement of cotton, say, from  
9 Southern California to the ports of California that was  
10 truck. But if you are dealing with cotton moving from  
11 California to the southeast or from Texas-Arizona  
12 origins to the southeast and to the north, I believe Mr.  
13 Rhodes would probably come out with a much higher rail  
14 market share.

15 Q Sir, on page 9, you discuss set-up automobiles  
16 and auto parts. You refer to them as carefully  
17 monitored cars. Are you really referring to these as  
18 freight shipments that are carefully monitored?

19 A Yes.

20 Q Who monitors these -- shippers, railroads, or  
21 both?

22 A Both.

23 Q Would you view automotive traffic as having a  
24 degree of time-sensitivity that distinguishes it from  
25 grain shipments or shipments of other bulk commodities?

1 A Yes.

2 Q You also state on page 9 that carriers who are  
3 not performing on schedule are in danger of being  
4 removed from the routing. Does this mean that service  
5 reliability and transit time for this traffic is more  
6 important to a competing railroad than service  
7 reliability and transit time for bulk shipments?

8 A I'm referring to performance being a factor  
9 influencing routing when the shipper has control over  
10 the routing in that sentence.

11 Q You also discuss on page 10 the pressure, at  
12 the top of page 10, the pressure that shippers of  
13 automotive traffic can apply in dealing with railroads.

14 Isn't one of the most common tools of auto  
15 shippers leverage in negotiating for better rates of  
16 service on one route, to threaten a railroad with taking  
17 traffic away from it in some other route?

18 A No. I thought it was in the route in which  
19 they were not performing. That has been my experience.

20 Q You're not familiar with National Account  
21 shippers, including auto shippers, who go into a railroad  
22 and say if you don't give us better service or rates  
23 from A to B, we'll take traffic away from you between C  
24 and D?

25 A If they can't put the pressure on from A to B,

1 and they have no alternative but putting from B to C,  
2 yes. But my experience has been that they put the  
3 pressure on in A to B when there is an alternative route  
4 and --

5 Q Well, let's assume there is not an alternative  
6 route. It works just as well, doesn't it, to threaten  
7 to take the traffic away from C to D?

8 A Yes. Power is power, and you apply it as you  
9 can.

10 Q In this kind of shipper leverage approach, to  
11 the extent that it's available today, it's still going  
12 to be out there in the marketplace after the SPSF  
13 merger.

14 A It will, depending on the number of carriers,  
15 but as the number of carriers has gone down, and if in a  
16 entire territory there is only one carrier, I find it  
17 hard to find where to put the pressure on. And I think  
18 that is what the shipper is going to determine when  
19 there are only three carriers carving up the West and  
20 three carriers carving up the East. Whom do you  
21 punish?

22 Q Okay, sir. Your discussion of car supply  
23 issues on page 12 and 13 refers apparently only to  
24 railroad-owned equipment. Is it correct that this  
25 discussion does not apply to shipper-owned or

1 shipper-leased equipment?

2 A No. It also -- well, it depends on the  
3 context in which you're asking the question. But  
4 shipper-owned equipment is a very sore point in the  
5 railroad industry today.

6 Q Yes, sir, but ideas about the cars that are  
7 saved, the round trips that are saved not being made  
8 directly available to the shipper -- of course, if it  
9 were shipper-owned or shipper-leased equipment and car  
10 time was saved, the shipper would get that direct  
11 benefit, would he not?

12 A Yes. If he can get more efficient utilization  
13 of his private cars so that he could reduce the number  
14 of cars necessary for transportation, he would receive  
15 that benefit; yes.

16 Q At the top of page 13, you assume that Santa  
17 Fe and Southern Pacific have optimum-sized equipment  
18 fleets today. What is your basis for that assumption?

19 A I did not assume. I said "if it is assumed."

20 Q Do you have any idea as to whether or not that  
21 is anywhere close to a correct statement?

22 A I cannot comment on the adequacy of the car  
23 supply of the SFSP.

24 Q Sir, your criticisms of the Kearney study seem  
25 to me to be essentially that some or all of the shipper

1 benefits described by the Kearney witnesses might not  
2 occur if competition is eliminated by the Central  
3 Corridor.

4 Is that a fair summary of your testimony?

5 A My basic statement says that only with  
6 competition can these benefits be assured.

7 Q Okay. Would it be true, then, that if  
8 competition via joint line routes and rates and  
9 competitive service were maintained, that the benefits  
10 described by the Kearney witnesses would indeed flow  
11 from this merger?

12 A You did not include as one of your assumptions  
13 of assurance over the complete life of the competitive  
14 market and --

15 Q All right. Build that in.

16 A Build it in. You still will not have the  
17 service everywhere. You will not have competition.  
18 There are other aspects of shipper benefits that will  
19 not accrue, such as innovation -- that stems from  
20 competition -- of a necessity to compete in various  
21 services, new services, innovation, car supply.

22 Many aspects of the firm will not be reviewed  
23 if there is no competitive necessity. I cannot forecast  
24 what tomorrow's economy will look like under a  
25 monopolistic structure as against a competitive



1 structure. But I think economic theory suggests that  
2 there's a greater possibility of change if it's a  
3 competitive structure.

4 MR. WILSON: Those are all the questions I  
5 have. Thank you.

6 JUDGE HOPKINS: Department of Justice, Mr.  
7 Ratner.

8 BY MR. RATNER:

9 Q Good morning. My name is James Ratner. I'm  
10 with the Department of Justice. I have just a very  
11 small number of questions for you.

12 And these may be areas that you've already  
13 testified on, and I apologize if I'm making you go over  
14 old ground.

15 Is it correct that one of the implications of  
16 your testimony, your responsive application testimony,  
17 Denver Rio Grande 14, is that traffic that is currently  
18 going over the Central Corridor via  
19 Southern Pacific-Denver Rio Rio Grande routing today  
20 will, after the merger, go over the Southern Corridor?

21 A Yes. That is my argument.

22 Q Is it correct that Southern Pacific is not for  
23 that traffic, the Southern Pacific is not able to use  
24 its own southern route today?

25 A They can use that route, but it is not as

1 competitive, and therefore it is not as assured a market  
2 as when it is served by the combined SFSP.

3 Q Is it correct to assume that the routing after  
4 the merger, then, will go over the Santa Fe portion of  
5 the merged firm?

6 A I believe that the routing will be over the  
7 combined route of the SFSP; yes.

8 Q Why is it that this traffic is not moving in  
9 Southern Pacific Santa Fe interline service today?

10 A Because they are highly competitive railroads  
11 and you would expect that when two roads are highly  
12 competitive, they will gravitate toward using third  
13 carriers so as to preserve their market shares.

14 And if they are not competitive, then, by  
15 definition, they will be sharing the new route which is  
16 advantageous to the merged system.

17 Q I guess I'm not quite sure what you mean by  
18 preserving the market shares. Let me set up an  
19 example. If Southern Pacific has a choice between  
20 making -- carrying a movement and then handing it off to  
21 Denver & Rio Grande, and carrying a portion of a  
22 movement and handing it off to Santa Fe, under those  
23 circumstances why is it better for Southern Pacific to  
24 hand it off to Denver & Rio Grande?

25 A In the competitive marketplace, if the SP were

1 to give the traffic to the Santa Fe that would  
2 immediately identify the particular movement, the Santa  
3 Fe would have in its hands the waybill describing the  
4 shipper, the origin, the destination, the commodity. It  
5 would be giving what we call market intelligence to the  
6 enemy.

7 Q I understand that. But in the context of the  
8 example I have set up, why is Santa Fe more of the enemy  
9 than the Denver & Rio Grande?

10 Q Because the Denver Rio Grande is part of a  
11 through route which it shares and is competitive with  
12 the Santa Fe, and it is only in conjunction with the  
13 Denver Rio Grande that they have a competitive  
14 alternative route.

15 Therefore, giving the traffic to the Denver  
16 assures it of its continuation in the future in the  
17 route, whereas giving it to the Santa Fe puts the  
18 traffic at risk in the future.

19 Q When you say "puts the traffic at risk in the  
20 future," does that suggest that in some way, then, Santa  
21 Fe is currently a potential competitor for that traffic?

22 A It's an actual competitor in most cases.  
23 Getting identification of shippers is very  
24 time-consuming. You have to have your traffic solicitor  
25 call on the shipper, and you have to hope that the

1 shipper will give the information, and you buy very  
2 expensive marketing information. You maintain market  
3 research offices which are rather expensive; whereas, if  
4 you just have one firm, the market for researchers goes  
5 down.

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1 I was not passing judgment on the contribution  
2 made by market researchers.

3 Q You may have been asked this.

4 If you know, how much of the Central Corridor  
5 traffic that is moving via Southern Pacific-Denver Rio  
6 Grande today is competitive with a possible Santa Fe  
7 Southern Corridor routing?

8 A Probably most of it.

9 Q On page 19 of your first verified statement,  
10 in the second full paragraph, the first sentence, you  
11 indicate that the SFSP will concede east-west traffic  
12 from the California-Oregon-CP territory.

13 Do you see that?

14 A Yes.

15 Q I realize you have been asked some about this,  
16 so I will try to be real brief.

17 What exactly is the traffic, if you could  
18 describe it for me, that the merged firm will concede?

19 A I believe they will concede the traffic from  
20 the jointly served areas in Northern California which  
21 would normally gravitate over the UP in the  
22 transcontinental route in return for concentrating on  
23 the traffic that goes north-south into the southern  
24 territory -- Southern Corridor, I'm sorry.

25 Q Is what you are describing, that there is some

1 traffic that naturally goes Central Corridor and some  
2 traffic that naturally goes Southern Corridor?

3 A No, I am not saying that there is a natural  
4 break of the traffic, but in terms of two railroads  
5 looking at the entire market, I see an inevitable  
6 division of the markets into two.

7 Now, whether one is more efficient on it or  
8 the other is immaterial. It is just a division of the  
9 market.

10 Q I understand that, but given -- I think what  
11 you have testified is that a good portion of this  
12 traffic could either go over the Central Corridor or the  
13 Southern Corridor. I am trying to get you to explain to  
14 me how it will be that a division will be made and what  
15 the nature of the traffic is that will be divided up.

16 A Well, the division will occur sort of  
17 naturally by the SFSP not maintaining the corridor  
18 through Oregon -- through the Ogden gateway, and the  
19 shippers in one area really having only one  
20 alternative.

21 Now, which shipper will be given to Party A  
22 versus which shipper is given to Party B I would hesitate  
23 to go down the line, but I think the traffic in the  
24 central California-southern Oregon traffic will just  
25 naturally gravitate toward the Central Corridor. The SP

1 would concentrate where they have the -- serving those  
2 shippers which would be on their line moving south to  
3 their territory through the Southern Corridor, and both  
4 not competing in the Central Corridor will allow the  
5 usual effects of monopoly, much higher rates through  
6 that territory.

7 I can't identify a particular carload and say  
8 this carload will now go here, but whichever carload  
9 goes there will be at a higher rate.

10 Q Let's take one example. Assume there is a  
11 shipper that is served by both, after the merger, is  
12 served by both the merged entity and by Union Pacific,  
13 and that the shipper is relatively indifferent as to  
14 whether the traffic goes over the Central or the  
15 Southern Corridor.

16 Will there be some sort of a market allocation  
17 process that will occur to determine who carries that  
18 shipper's product?

19 A I can visualize the shipper not particularly  
20 caring. If transportation cost is such a small part, it  
21 really doesn't bother him that he is dealing with a  
22 monopolist and that the rate might be some percentage  
23 above what it was before. He is not concerned about the  
24 market. But the shipper in Northern California looking  
25 at the marketplace will, if he is on the UP, he will

1 just run across the Central Corridor on the UP. If it  
2 is open to reciprocal switching, you might have salesmen  
3 calling on both of them, and you again have a somewhat  
4 very nice division of the markets. You have two  
5 carriers. You might get fifty-fifty, but the result  
6 will still be that in both cases they will pay more.

7 Q Is there some traffic that -- and I don't know  
8 if you have already, or are describing for me now, is  
9 there some traffic that for cost reasons can't feasibly  
10 go on a southern route, even the Santa Fe southern route  
11 that are in the CP territory you have described?

12 A Some traffic for cost reasons?

13 Q Which cannot feasibly go over either the Santa  
14 Fe or the Southern Pacific southern route.

15 A If the rates end up being the same only 20, 25  
16 percent higher, I think the shipper is in the same  
17 position, so the costs don't make any difference to  
18 him. He won't know what the costs are except that he  
19 will know the rates are the same.

20 Q Excuse me, I meant the cost to the shipper.

21 A The costs to the shipper, if they are the  
22 same, then the probably will only be how much  
23 transportation cost can he afford. What is his  
24 elasticity of demand?

25 I'm sorry, I don't seem to be --



1 Q Let me start over.

2 Is there any traffic for which the Southern  
3 Corridor is not a competitive alternative, that is in  
4 the CP territory?

5 A I would suggest that the only traffic that  
6 wouldn't be is the traffic the SP decides no, we don't  
7 want that, we will just let the UP carry it. It is  
8 possible there may be some very specialized  
9 circumstances, you don't want to ship wine in August in  
10 a tank car through west Texas, not if you want to have  
11 good wine.

12 Q To the extent that such traffic exists, is it  
13 your testimony that Southern Pacific right now is  
14 conceding that to the UP?

15 A No, the Southern Pacific is maintaining a  
16 competitive route structure with the Denver Rio Grande  
17 and is competing with the Southern Pacific for traffic  
18 that goes through this corridor.

19 Q Is it your testimony that after the merger,  
20 the merged entity would concede that traffic?

21 A Yes.

22 MR. PATNER: That's all the questions I have.

23 JUDGE HOPKINS: Mr. Solander?

24 MR. SOLANDER: Yes, Your Honor, I have three  
25 questions on two topics.

1 BY MR. SOLANDER:

2 Q Dr. Banner, my name is O. J. Solander, and I  
3 represent the California Department of Transportation.  
4 My department and the California Public Utilities  
5 Commission are cooperating in investigating the impacts  
6 of the proposed merger and the responsive applications  
7 in this proceeding.

8 I would like to direct your attention to a  
9 portion of the Central Pacific territory, a geographic  
10 area between Lathrop, California and Fresno, California,  
11 in terms of Table 1 of your verified statement in  
12 DRGW-14. It would be the area in California roughly  
13 from the San Francisco Bay tip there, the east tip of  
14 the Bay, down to the southern part of the shaded area.

15 Do you see that area?

16 A I see it on the map, but my knowledge of the  
17 specific points in California is limited, so please bear  
18 with me.

19 Q Okay. I am hoping I can speak in generic  
20 terms.

21 Is it your understanding that the Union  
22 Pacific is also seeking to serve that area by way of its  
23 responsive application through trackage rights on the  
24 southern portion of California?

25 A I believe the Union Pacific has asked for

1 trackage rights, but I did not study them, and I really  
2 do not know sufficiently about them to comment  
3 intelligently.

4 Q For purposes of my question which I will ask,  
5 I would like you to make the assumption that that is the  
6 trackage rights application, or at least a portion of  
7 the application of Union Pacific.

8 Do you have any familiarity, Dr. Banner, with  
9 the application of the Kansas City Southern, KCS?

10 A I am acquainted with it. If I may go back and  
11 make one further comment on your previous question, the  
12 fact that the Union Pacific gets in there excluding the  
13 Denver Rio Grande trackage rights still leaves only one  
14 railroad in the Central Corridor, the Union Pacific. So  
15 in that respect I am acquainted with the UP conditions.

16 The UP conditions do not solve the problem  
17 that my testimony addresses itself to.

18 Q My question -- and I will tell you where I am  
19 leading -- is to try to identify within the particular  
20 geographic area all the carriers that might be competing  
21 for traffic within that corridor, and then I want you to  
22 make a comment with respect to competition relating to  
23 those circumstances.

24 So let me go back again and ask you about the  
25 Kansas City Southern application.

1           Are you generally familiar with that  
2 application?

3           A     I believe they are asking for an independent  
4 ratemaking authority over the Southern Corridor.

5           Q     Would it be your understanding that that  
6 ratemaking authority would include the area that we are  
7 talking about between Lathrop and Fresno?

8           A     I do not know. I believe so, but I am not  
9 certain. I don't have any knowledge.

10          Q     I would like you again to make the assumption  
11 that that would be the case.

12          A     But then again, if it is over the southern  
13 route, that might have relevance to the southern route,  
14 but it does not have any relevance to the Central  
15 Corridor.

16          Q     My question would be for the purposes of  
17 competition, would you exclude the Union Pacific from  
18 the territory we are talking about between Lathrop  
19 and --

20          A     Would I exclude them in terms of the  
21 competitive structure?

22          Q     Yes.

23          A     Or policymaking.

24          Q     No, in terms of the competitive structure.

25          A     From the competitive structure, I cannot see

1 that the Union Pacific, any Union Pacific conditions  
2 would address the problem of the Central Pacific --  
3 Central Corridor and the issue that the Commission faced  
4 in the Union Pacific-MoPac merger; only the Denver Rio  
5 Grande conditions specifically addressed that  
6 competitive problem.

7 Q And what is that competitive problem?

8 A That is the problem of a second competitor in  
9 the Central Corridor.

10 Q I am talking about the corridor that we have  
11 in California, the portion of the Central Pacific  
12 territory. For that corridor, competition within that  
13 corridor.

14 A Well, if the competition in that corridor is  
15 in the transcontinental market, then I say only the  
16 Denver Rio Grande conditions address the problem of that  
17 corridor that you describe.

18 Q So it would be your testimony that it would be  
19 unnecessary for competition within that corridor to have  
20 the presence of the Union Pacific Railroad?

21 A I don't want to say it is unnecessary. I  
22 merely want to say that in addressing the problem that I  
23 dealt with, that is, the competition of that corridor in  
24 this transcontinental market outlined in Figure 1, the  
25 Denver trackage rights deal specifically with that

1 competitive problem. I don't think that the Union  
2 Pacific conditions address the Central Corridor at all.

3 Q Well, wouldn't a shipper within the specific  
4 area that we are talking about, if there were three  
5 carriers in that corridor, that is, the SFSP, the Denver  
6 Rio Grande and the Union Pacific, wouldn't that shipper  
7 have a choice of utilizing either the Central Corridor  
8 or the Southern Corridor?

9 A For certain markets the two corridors would  
10 compete, yes. If you were going all the way to the east  
11 coast, as I mentioned previously, if they were competing  
12 for the market to Washington, D. C., a shipper there  
13 might have the two routes, but the fact that there is  
14 only one carrier in each route could result in the fact  
15 that they have divided the markets, and on both routes  
16 you are going to have a much higher rate structure than  
17 competition would have resulted in.

18 Q Now, how about the presence of the Kansas City  
19 Southern and that independent ratemaking authority?  
20 What would be your opinion as to the effect on  
21 competition of that kind of authority within the  
22 corridor in California that we are talking about?

23 A I cannot comment on the effect of the IRMA on  
24 that route because that I presume would be over the  
25 Southern Corridor. The fact that it goes over the

1 Southern Corridor in order to analyze it, we would have  
2 to see what the effect of that would be as a control  
3 over competition in that Southern Corridor as it relates  
4 to the absence of competition in the Central Corridor,  
5 again, so that I do not know what the rate structure  
6 would be except that you would have lessened  
7 competition, and in the resulting division of markets  
8 you might have a higher rate structure in both.

9 Q Is it your understanding that the KCS assumes  
10 that it will utilize only the Southern Corridor?

11 A I presume that. I do not know.

12 Q Dr. Banner, are you familiar with what is  
13 known as the Central Pacific conditions?

14 A Roughly, yes.

15 Q Do you understand that one feature of those  
16 conditions generally stated is the SP is required to  
17 solicit business for the central corridor?

18 A Yes, in conjunction with the Union Pacific.

19 Q In your analysis, did you consider the impact  
20 of those conditions?

21 A We assumed that the Central Pacific conditions  
22 were dead in that the solicitation agreement with the UP  
23 was gone and the only remaining aspect was the joint  
24 solicitation agreement between the Southern Pacific and  
25 the Denver Rio Grande, and the testimony would indicate

1 that at the merger of the SFSP, that last part of the  
2 conditions would have a death knell.

3 Q What is the Central Pacific conditions do not  
4 die? Would that have any impact on your opinion?

5 A No, I do not think it would have a sufficient  
6 effect because the Central Pacific conditions were  
7 responsive to a competitive situation. The Southern  
8 Pacific maintained and the Union Pacific were able to  
9 maintain a competitive route with those conditions, and  
10 there was an incentive to maintain a competitive route.  
11 With only two carriers, one in the Central Pacific -- in  
12 the Central Corridor and one in the Southern Corridor,  
13 there is no incentive to achieve what those conditions  
14 were aimed at, and therefore, in order to get the  
15 results of what the Commission attempted to achieve,  
16 both in the conditions of the CP and in the UP-MF  
17 merger, you have to have another carrier in the Central  
18 Corridor, which is what the Denver conditions  
19 specifically address themselves to.

20 Q So it is your opinion that if those conditions  
21 remained, then your opinion is not affected, is that  
22 correct?

23 A It will not be affected.

24 MR. SOLANDER: That's all I have.

25 JUDGE HOPKINS: Thank you.



1 Did you have any, Ms. Reed?

2 MS. REED: No.

3 JUDGE HOPKINS: Any redirect?

4 MR. VON SALZEN: No redirect, Your Honor.

5 JUDGE HOPKINS: You are excused, sir.

6 (The witness was excused.)

7 MR. VON SALZEN: Your Honor, we move the  
8 admission of Dr. Banner's two verified statements.

9 JUDGE HOPKINS: Any objections?

10 MR. WILSON: No objection.

11 JUDGE HOPKINS: They will be received in  
12 evidence.

13 Let's recess until 1:45.

14 (Whereupon, at 12:35 o'clock p.m., the hearing  
15 in the above-entitled matter recessed to reconvene at  
16 1:45 o'clock p.m., this same day.)

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AFTERNOON SESSION

(1:45 p.m.)

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

4 Mr. Von Salzen?

5 MR. VON SALZEN: Your Honor, before calling  
6 Mr. Nelson, Dr. Banner asked me to correct the record  
7 with respect to the source of one piece of information  
8 from his cross examination this morning.

9 On page 6 of his revised statement of November  
10 21, the source of the rate information there is the 1982  
11 ICC waybill sample, not the applicant's augmented  
12 sample.

13 JUDGE HOPKINS: Thank you.

14 MR. VON SALZEN: The Rio Grande calls Mr.  
15 Michael Nelson.

16 Whereupon,

17 MICHAEL A. NELSON

18 was called as a witness by counsel for the Denver & Rio  
19 Grande Western Railroad and, having been duly sworn by  
20 the Administrative Law Judge, was examined and testified  
21 as follows:

22 DIRECT EXAMINATION

23 BY MR. VON SALZEN:

24 Q Mr. Nelson, do you have before you your  
25 verified statement filed November 21, 1984 in Volume

1 DRGW-20?

2 A I do.

3 Q Are there any changes you would like to make  
4 in that statement at this time?

5 A Yes, a small number.

6 On page 10, the tenth line down that begins  
7 "versus low volume traffic lanes (Factor no. 1)," delete  
8 the word "has" and insert "have." That's a small  
9 grammatical change.

10 On page 11, line No. 2, 333 should be 336.  
11 And that change should also be made on page 2 of  
12 Appendix A.

13 On page 44, the eighth line, "the tremendous  
14 weight of the" and the word should be "quantitative."

15 And in Table 8, which follows page 42, the  
16 last figure in the table in the lower right hand corner,  
17 instead of 5.24 should be 4.36.

18 And that's all.

19 Q With those changes as you have indicated them,  
20 Mr. Nelson, is this testimony correct to the best of  
21 your knowledge and belief?

22 A It is.

23 Q Do you adopt it as your testimony in these  
24 proceedings?

25 A I do.

1 MR. VON SALZEN: We have nothing further, Your  
2 Honor. The witness is available for cross examination.

3 JUDGE HOPKINS: Thank you.

4 Mr. Smith?

5 CROSS EXAMINATION

6 BY MR. SMITH:

7 Q Good afternoon, Mr. Nelson. My name is  
8 Michael Smith. I am cross examining you briefly, I  
9 hope.

10 When I refer to the term, the letters NMTDB, I  
11 will, as you have in your statement, be talking about  
12 the National Motor Transport Data Base, and similarly,  
13 when I use the term TRAM, T-R-A-M, which is another  
14 acronym, I will be referring to Transportation Research  
15 and Marketing.

16 First of all, I notice in your qualifications  
17 you say that you were manager of consulting services for  
18 NMTDB.

19 Can you tell me when that was and about how  
20 long you were in that position?

21 A I was officially put in that position early in  
22 1983. I am not sure if it would be useful if I gave a  
23 little bit of the history of the project, at least from  
24 the perspective of Charles River Associates, and perhaps  
25 that would put my role in a clearer light.

1 Charles River Associates originally became  
2 involved in the project, in sponsoring the project, at  
3 the beginning of 1982, and through 1982 and into 1983  
4 their primary orientation in marketing the data base  
5 involved selling the raw data to clients who would use  
6 it in whatever ways they could beneficially use it.

7 Their initial concept was to sell the raw data  
8 to a large number of subscribers at a substantial fee,  
9 and this be able to pay Mr. Baker and make some money  
10 for themselves. I initially advised them that there  
11 were difficulties that people would encounter in using  
12 the data base for anything other than looking at  
13 individual moves.

14 Now, looking at individual moves can be a  
15 value in a marketing sense because it helps you identify  
16 who is shipping what from where. But there are severe  
17 limitations on the use of the data base for corridor or  
18 industry type studies that I advised Charles River of in  
19 1982 when they became involved in the project.

20 I had some exposure to the NMTDB by virtue of  
21 previous projects that I had worked on involving motor  
22 carrier industry analysis and had been contemplating  
23 some of the statistical requirements associated with  
24 making more proper interpretation of the data base than  
25 can be made from simply looking at the raw data, and in

1 1983, as Charles River was experiencing difficulty in  
2 marketing under their original concept, I was appointed  
3 manager of consulting services and given the authority  
4 to market studies at a corridor or industry level if  
5 that would make use of the statistical concepts that I  
6 felt were needed to be applied to the data if it were to  
7 be satisfactorily used for those purposes.

8 Q So how long did you -- I'm not sure I heard  
9 that in your answer. The question was how long were  
10 you --

11 A I can complete that. I remained employed at  
12 Charles River Associates for approximately one year  
13 after that time. However, much of the latter part of  
14 that year was consumed by my involvement in another  
15 litigation project that prevented me from spending as  
16 much time as I would have liked in marketing and  
17 consulting services. I would say approximately four or  
18 five months.

19 Q You mentioned that you, while at Charles  
20 River, working with NMTDB data, that you were marketing  
21 that data to clients of Charles River Associates.

22 Can you tell us, did the clients who purchased  
23 it include railroads?

24 A The clients who purchased the raw data from  
25 Charles River included railroads.

1 Q Which ones were those?

2 A Like I say, I was not directly responsible for  
3 that portion of their marketing effort. I believe the  
4 SP was one of the big users, and the UP, and at some  
5 point the BN became involved, but not earlier on is my  
6 recollection.

7 In 1982 I believe the AAR sponsored a good  
8 part of the cost of the collection, and that it wasn't  
9 until '83 that the individual roads began paying.

10 Q Do you know what the NMADB Users Committee  
11 is?

12 A I am aware that there is a group of users, and  
13 that there is an annual meeting, I believe.

14 Q Do you know who the members of that committee  
15 are?

16 A Not specifically, no.

17 Q Have you ever attended a policy meeting of  
18 that committee?

19 A No, I have not.

20 JUDGE HOPKINS: Mr. Nelson, would you speak a  
21 little louder, please?

22 Thank you.

23 BY MR. SMITH: (Resuming)

24 Q Now, I take it from the history that you have  
25 described of your involvement with NMTDB, that you did

1 not have any role in designing that data or the  
2 questionnaire upon which it is based?

3 A During the period when the survey was  
4 administered under the sponsorship of Charles River  
5 Associates, we were involved in the survey design  
6 process, so I did participate in that. I believe it was  
7 for the 1983 survey instrument.

8 Q Have you ever worked for the Association of  
9 American Railroads as an NMTDB consultant?

10 A No, I have not.

11 Q Does your prior experience include any time  
12 working for a motor carrier or a railroad?

13 A No, except as a consultant.

14 Q This is just curiosity. On your  
15 qualifications you say you received your Bachelor's  
16 Degree from MIT in 1977. You didn't say what it was  
17 in.

18 What was it?

19 A Management.

20 Q On page 7 of your statement you have a quote  
21 from a group called the Truck and Waterway Information  
22 Center of the AAR.

23 Are you aware what their role was in the  
24 original designing of the NMTDB from the beginning?

25 A I am aware that various publications were



1 issued by the Truck and Waterway Information Center  
2 presenting their analyses of the data. I am not aware  
3 of what their role was at the outset in designing the  
4 survey.

5 Q So you don't know whether or not this group,  
6 Truck and Waterway Information Center of the AAR, was  
7 involved in the actual designing of the NMTDB?

8 A I say I don't know what their role was in  
9 1977. I know that analyses were conducted under their  
10 name and released.

11 Q And I take it also you were not involved in  
12 whatever effort the AAR might have been involved in with  
13 designing of NMTDB, is that right?

14 A Not as an employee or as a consultant to  
15 them. I was familiar with some of the publications that  
16 they released.

17 Q But in terms of the actual design of the data  
18 base, that was not something you were involved in at  
19 all, was it?

20 A No.

21 Q Do you have an opinion as to, or any knowledge  
22 as to what the primary objective of NMTDB was from the  
23 outset in terms of the types of movements that it was  
24 seeking to obtain information concerning?

25 A I believe that the documentation is fairly

1 explicit, that it was designed to obtain information on  
2 long haul moves that were of interest to the railroads  
3 in marketing their TOFC services.

4 Q So it was not interested, for example, in  
5 obtaining information on all intercity truck moves, just  
6 the long haul moves, is that correct?

7 A Yes, and that is one of the factors that you  
8 have to consider when you try to extrapolate from the  
9 NMTDB to generalize about the intercity trucking  
10 industry.

11 Q And I take it from reading your statement --  
12 and I don't need you to summarize it because we have  
13 your statement, but I take it that one of your basic  
14 positions in this case is that most intercity truck  
15 moves are long hauls, is that right?

16 A I believe that when properly analyzed, the  
17 data show that.

18 Q Yes, and that would be particularly true, for  
19 example, would it not, in densely populated regions of  
20 the country like the northeast where you have -- you  
21 would expect to find a lot more short hauls, would you  
22 not?

23 A Well, as long as we understand that we are  
24 talking about intercity moves and not local moves, yes.

25 Q And I take it also it is your position in this

1 case that railroads do not compete with trucks for the  
2 most part for intercity traffic over the shorter  
3 distances, is that right?

4 A I have not analyzed rail competitiveness on  
5 short haul moves. I have only analyzed the CP territory  
6 and the transcontinental traffic that I presented the  
7 data on. I really take no position with respect to the  
8 competitiveness on shorter hauls or in other corridors.

9 Q Well, let's take a look at page 13, for a  
10 minute, of your statement, towards the bottom there.  
11 You say that -- you refer to the conventional wisdom  
12 that trucks are oriented primarily toward the shorter  
13 haul intercity moves.

14 Do you see that?

15 A Yes.

16 Q And then again on page 23, ten pages later,  
17 the first full paragraph, right in the middle, you say  
18 "While there are some areas of overlap, truck and rail  
19 provide inherently different transportation services.  
20 In general, rail provides low cost transportation for  
21 large shipments of bulk and other commodities,  
22 particularly over long distances while the truck is  
23 better suited for short movements," and so on.

24 Now, first of all, let me ask you, on page 23  
25 there, what would the area of overlap be? Wouldn't it

1 be more likely to be found in areas where trucks were  
2 handling the same commodities as rails over the longer  
3 distances?

4 A Well, I believe the term "overlap" is  
5 addressed subsequent to this statement in much more  
6 detail in terms of the substitutability that you  
7 actually can infer from the data.

8 Q Okay.

9 Well, would part of the answer to that  
10 question, would this overlap exist, as you have referred  
11 to it, in the areas where one would find trucks handling  
12 the same commodities as rails over longer hauls?

13 A Can you define for me "the same commodities"  
14 as you are using it?

15 Q Well, the same, exactly, the identical  
16 commodities, similar commodities.

17 A I would define overlap in this context to be  
18 the ability of truck to substitute for rail for current  
19 rail services, taking all of the characteristics of the  
20 rail traffic into account.

21 Q Well, let me ask it this way. If you were  
22 trying to obtain data on those truck movements that were  
23 more likely to be rail competitive, wouldn't you look,  
24 among other things, all other things equal, let's say,  
25 wouldn't you look at the longer haul truck movements?

1           A     Yes, I believe that I have looked at the  
2 longer haul truck movements.

3           Q     Okay, as a subset, for example, of al  
4 intercity truck movements.

5           A     Well, I have identified what I consider to be  
6 the distinguishing characteristics of long haul truck  
7 movements relative to the universe of truck movements,  
8 and then within the context of long haul truck  
9 movements, I have examined their ability to substitute  
10 for a long haul rail movement in this corridor.

11          Q     But basically, can we agree there that if any  
12 truck movements are going to be able to constrain the  
13 behavior of these merged railroads, assuming the merger  
14 goes through, it is probably going to be the long haul  
15 truck movements that you would be looking at, wouldn't  
16 it, if any?

17          A     If any. Yes, I agree that you need to look at  
18 long haul truck movements and their characteristics and  
19 ability to substitute for long haul rail movements.

20          Q     Okay.

21                     Now, at this point you have talked a little  
22 bit about the AAP, the Association of American  
23 Railroads

24                     I want to introduce and have marked three  
25 exhibits which I will distribute here. I am sorry about

1 their bulk, but that is the way they came. These would  
2 be Statistical Overview of the Intercity Trucking  
3 Industry, published by the Economics and Finance  
4 Department of the Association of American Railroads,  
5 ands they are for three separate years, 1979, 1980 and  
6 1981.

7 And I would like to mark those in date order  
8 SFSP-C-122, 124 and 124 respectively.

9 JUDGE HOPKINS: They will be marked for  
10 identification.

11 (The documents referred to  
12 were marked Exhibit Nos.  
13 SFSP-C-122, SFSP-C-123 and  
14 SFSP-C-124 for  
15 identification.)

16 BY MR. SMITH: (Resuming)

17 Q Now, Mr. Nelson, I have distributed these to  
18 your counsel prior to your testimony so you would have  
19 an opportunity to at least look them over over the  
20 weekend.

21 A Yes.

22 Q Is it true that these documents were prepared  
23 using NMTDB data?

24 A They appear to have been prepared using the  
25 raw data, unadjusted for any of the weighting factors

1 that I describe in my statement.

2 MR. SMITH: Correct.

3 Incidentally, for the record, this document  
4 states on the face of it that it is confidential, not to  
5 be quoted without permission.

6 For the record, Your Honor, the Applicants  
7 have obtained permission of the Association of American  
8 Railroads to have these become part of the public  
9 record.

10 JUDGE HOPKINS: Thank you.

11 MR. VON SALZEN: I trust that permission has  
12 been obtained for Mr. Nelson to speak about them as  
13 well?

14 MR. SMITH: Yes, we explained the situation.

15 JUDGE HOPKINS: Thank you.

16 BY MR. SMITH: (Resuming)

17 Q Now, first of all, Mr. Nelson, we can take any  
18 one of these three because I think that by and large the  
19 introductory material in each of them are substantially  
20 the same, but could you take a look at, on the preface,  
21 which is the very first page under the cover, and read  
22 aloud, if you would, the first sentence of the second  
23 paragraph?

24 A Do you have a preference for which one I read  
25 from?

1 Q It doesn't make any difference. I think you  
2 will find they are all identical.

3 A The first paragraph?

4 Q The second paragraph in the preface, the first  
5 sentence.

6 A "The information is offered as source material  
7 for those with an interest in rail-competitive  
8 trucking."

9 Q Okay.

10 Now, take a look at page Roman numeral II-1,  
11 and again, you can take your choice of which of these  
12 three because I think you will find they are identical.

13 Under the heading "Objective of the Survey,"  
14 down towards the bottom there, could you read the first  
15 sentence, please?

16 A "The NMTDB survey has been undertaken in order  
17 to obtain information about the rail-competitive sector  
18 of the trucking industry."

19 Q Okay.

20 So would you agree from this, does it not  
21 appear that the intent of the NMTDB, at least as the AAR  
22 understood it, which reported the data, was to study a  
23 more narrow subset of the entire universe of intercity  
24 trucking, namely, the rail-competitive trucking on long  
25 haul traffic?



1           A     I agree that their intent was to study the  
2 long haul trucking.

3                     I think we need to put "rail-competitive" in  
4 its proper context, however, that the most recent of  
5 these documents is 1981, and that changes in the  
6 competitive situation may have occurred in the wake of  
7 the regulatory changes such that rather loose  
8 terminology that may have once upon a time been  
9 appropriate may not be so in this case.

10           Q     In other words, may I take it from that that  
11 your position is that since 1981 trucks have become less  
12 competitive with rail?

13                     Is that the thrust of what you are saying?

14           A     I believe there is a quote to that effect in  
15 the 1981 summary; the AAR document itself indicates that  
16 rail marketing initiatives in TOFC have been successful,  
17 and that rail's long haul role has been expanding at the  
18 expense of trucks, and that trucks may not be able to  
19 compete as effectively for the traffic.

20           Q     Okay.

21                     For example, let's take a look at Table Roman  
22 numeral VI-5.

23           A     Which year?

24           Q     Well, I wanted to take a look quickly at all  
25 three of them.

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A It will take me a second here.

(Pause)

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1 Q Incidentally, while you are doing that, we put  
2 extra copies of these documents back on the table so  
3 that people in the hearing room would be able to have a  
4 look. I apologize for not mentioning that.

5 A I think I have them all.

6 Q Okay. I just wanted you to first of all -- I  
7 wanted to first of all ask you, this Table 6-5,  
8 generally what does that purport to show?

9 A It is entitled Length of Haul, Distribution by  
10 Commodity Group, and it shows the number of -- well, the  
11 percentage breakdown of the observations of different  
12 commodity types into mileage blocks of approximately 250  
13 miles up to 1,500 miles, and then 500 miles beyond  
14 that.

15 Q Okay. If you take a look down in each table  
16 at the all commodities column -- do you see that?

17 A Yes.

18 Q And it shows for all of these different  
19 commodities the percent, does it not, of truck hauls  
20 that fall within these various mileage blocks, and what  
21 I would like to do is have you confirm for me that for  
22 1979, this shows that 50 percent of all commodities were  
23 moving in excess of 1,000 miles according to this table.

24 A Well, again, this table only indicates what  
25 the raw data show, and from my experience, it has no

1 more validity than a comparable table drawn from the  
2 rail way bill data without adjusting for the different  
3 sampling rates.

4 So as long as we understand that it just  
5 indicates what the raw data show, I will add up the  
6 percentages.

7 Q In 1980, does it not show 58 percent over  
8 1,000 miles?

9 A Yes, it appears to.

10 Q 1981 would be somewhat less, 54 percent, I  
11 think. Is that right?

12 A I get 54; 54, I believe.

13 Q Now, if you take a look at Table 8 in your  
14 verified statement, which is toward the end following  
15 Page 42, you will see, and I guess that is where you  
16 made a correction of that last number. For 1983, for  
17 example, you have 4.36 percent.

18 If you look, for example, at 1980 and 1981,  
19 which are the same years that the AAR reports that we  
20 looked at referred to, at least for those same years,  
21 you will see that you have got quite a bit lower  
22 percentages, and that is because I take it that you have  
23 adjusted this raw NMTDB data as you describe in your  
24 statement.

25 A I would phrase it differently. I would say

1 that the difference is because the raw data are heavily  
2 biased towards long haul for the reasons that I have  
3 described, but I essentially agree that the difference  
4 is due to the methods that I used to correct for the  
5 biases in the raw data.

6 Q So your source, for example, in Table 8,  
7 Footnote 4, source, NMTDB, should really say adjusted  
8 NMTDB. Isn't that right?

9 A That's correct. I believe all of the numbers  
10 that I present from the NMTDB are adjusted using the  
11 weighting procedures in my statement except as otherwise  
12 noted as being from the raw data.

13 Q I have another question on this subject here.  
14 Is your criticism of what you call at some point in your  
15 statement the non-randomness of NMTDB, is that limited  
16 to attempts to use the unadjusted or raw NMTDB results  
17 to express total or national conclusions, or would it be  
18 meaningful to use NMTDB data unadjusted, for example, to  
19 examine truck flows past a single point?

20 A I believe to analyze even truck flows past a  
21 single point you need to take account of the  
22 propensities of different types of drivers to stop at  
23 your sampling location, unless you have a methodology  
24 like the ICC survey that I have described in which you  
25 have state police personnel that enable you to pull the

1 trucks over according to a sampling plan that you design  
2 rather than rely on truckers to stop.

3 Q Let's take a look at the 1980 report, Exhibit  
4 SFSP-123, and I want to refer you to Table III-5.

5 A I have that.

6 Q Now, this shows, does it not, the flows,  
7 Length of Haul, Distribution by Location? Is that  
8 right?

9 A That's what it is labeled, yes.

10 Q For example, if we look at Burley, Idaho, the  
11 third entry there for location, does it show that about  
12 60 percent, if you can quickly do that, are over 1,500  
13 miles at that point?

14 A I would say that it shows that 60 percent of  
15 the people who participated in this survey were on hauls  
16 of 1,500 miles or above.

17 Q Right. Rock Springs, Wyoming, that is down  
18 there about three-quarters of the way. Similarly, does  
19 it not show that according to this table, anyway, 66  
20 percent is greater than 1,500 miles?

21 A Subject to the same description that I just  
22 gave.

23 Q And Wells, Nevada, down in that last group, as  
24 I add it up, it comes to 64 percent being greater than  
25 1,500 miles. Do you see that?

1 A Yes.

2 Q Would it surprise you -- maybe you already  
3 know this -- to learn that in 1983 the NMTDB data for  
4 these locations that I just mentioned indicate an  
5 average length of haul of over 1,500 miles, unadjusted,  
6 again.

7 A It wouldn't surprise me, and in fact the fact  
8 that the data base unadjusted gives that kind of result  
9 is one of the principal obstacles that I encountered in  
10 marketing consulting services to people familiar with  
11 the industry.

12 The typical quote that I got from a number of  
13 other consultants was, it couldn't possibly be  
14 representative if that is what it shows on length of  
15 haul. The statistics that the AAR published on length  
16 of haul went a long way towards persuading people that  
17 the unadjusted data could not be used in a way that was  
18 representative of the industry or corridors.

19 Q So I take it you don't agree with the little  
20 conclusion down at the bottom of that table that says  
21 intercity trucking is rail competitive even in long haul  
22 markets.

23 A I agree that trucking occurs in long haul  
24 markets, and I believe I have explained in my statement  
25 some of the circumstances that contribute to their

1 presence. However, the term "rail competitive" in this  
2 case has a specific connotation, and my analysis leads  
3 me to disagree with that statement at the bottom as an  
4 accurate generalization.

5 Q Let me ask you, have you ever either driven in  
6 an automobile or flown in an airplane across these areas  
7 that we just talked about, Idaho, Nevada, Wyoming?

8 A I have flown transcontinentally, yes.

9 Q Would you agree that that region of the  
10 country is really quite desolate? There is not much out  
11 there in terms of population, is there?

12 A In general I guess that's an accurate  
13 characterization.

14 Q And it is quite a bit different, isn't it, in  
15 terms of the economy and the population density than you  
16 would find in the northeast, isn't it?

17 A I have not made a specific analysis for the  
18 purpose of the statement here, but I would agree in  
19 general.

20 Q Do you agree or disagree that you would not  
21 expect to find very many short haul truck movements  
22 going by, for example, Burley, Idaho?

23 A I really have no basis for drawing that  
24 conclusion.

25 Q Same thing for Wells, Nevada, or Rock Springs,



1 Wyoming.

2 A I based the methodology in my statement on a  
3 comparison between the NMTDB results and the results of  
4 a survey that I considered to be not susceptible to the  
5 types of biases that I identify. And that survey, the  
6 ICC survey overall identified a much higher proportion  
7 of short haul movements.

8 So, I believe that in general there are more  
9 short hauls than shown by the NMTDB data, and that the  
10 incidence of short hauls may differ at different  
11 sampling locations.

12 Q Well, we will get to the ICC study in just a  
13 minute here. But first I wanted to talk a little bit  
14 about the area the DRGW has defined as the central  
15 Pacific territory.

16 I take it that Rio Grande's primary concern is  
17 the traffic moving between those two regions that are  
18 defined as central Pacific territory. Is that right?

19 A That was the focus of my analysis.

20 Q Do you have any idea even roughly what the  
21 average -- well, not average, that is a bad word -- what  
22 the range of distances are between those two areas? And  
23 by that I mean between northern California, Oregon,  
24 Nevada on the one hand and points on the eastern side of  
25 this territory on the other.

1           A       Most of my analysis focused on California,  
2 Oregon, to the eastern transcontinental area, and I  
3 believe all of those moves are in excess of 1,000  
4 miles.

5           Q       So again if you wanted to, I think we  
6 discussed earlier and established that if you are going  
7 to have any possibility of trucks being competitive with  
8 railroads, it would have to be in the 1,000 miles and  
9 over category?

10          A       And that is one of the categories I used in my  
11 analysis. Yes, I agree.

12          Q       Okay. Now, in your testimony you do rely  
13 heavily, I think, on this ICC study that was published  
14 by the Bureau of Economics and the Bureau of Operations  
15 in April of 1977. That is the empty loaded truck miles  
16 on interstate highways during 1976. Is that correct?

17          A       Correct.

18                 MR. SMITH: I would like to distribute and  
19 have marked as an exhibit a copy of that study, please.  
20 This would be SFSP-C-125.

21                 JUDGE HOPKINS: That will be marked for  
22 identification.

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

Number SFSP-C-125.)

1  
2 BY MR. SMITH: (Resuming)

3 Q Okay. First, let me ask you, Mr. Nelson, do  
4 you believe that this ICC survey accurately reflects the  
5 universe of trucks operating in the United States in  
6 1982?

7 A No, and I don't depend on that assumption in  
8 my study.

9 Q Okay. In your mind, is there any difference  
10 between a -- stastically between a universe and a  
11 cross-section?

12 A If you could define whatever subtleties you  
13 associate with either term.

14 Q Well, I am not sure. Are you a statistician?  
15 I am not.

16 A I have some training in econometrics and  
17 statistics. I am not prepared to distinguish fine  
18 points between your two --

19 Q Okay. Let's take a look at Page 43 of this  
20 Exhibit 125, the ICC survey. I want to refer you to  
21 Figure 2.

22 A Yes, I have that.

23 Q Now, this shows Distribution of Refrigerated  
24 Vans. I want to look at that, on the righthand side,  
25 the loaded and partly loaded refrigerated vans. Do you

1 see that part?

2 A Yes, I do.

3 Q Now, this shows, does it not, a fairly  
4 constant truck presence out to about 2,000 miles, does  
5 it not?

6 A It shows that there are trucks that move out  
7 in that range, but I would caution you that the text  
8 that describes Figure Q and this other series of figures  
9 contains a very important cautionary note that these  
10 distributions are the distributions of vehicle miles  
11 traveled, and not the distribution of hauls per se.

12 A truck traveling 2,000 miles counts 20 times  
13 as much as a truck traveling 100 miles for purposes of  
14 the preparation of this table. So the table is not  
15 representative of hauls. It is representative of VMT,  
16 and really should not be interpreted as indicating that  
17 a truck presence is constant with respect to hauls.

18 Q Okay. Well, let me ask you this. Take a look  
19 at the 1981 AAR report, Exhibit 124, Table V-4. That is  
20 Length of Haul, Distribution by Trailer Type, right?

21 A That's what it says.

22 Q Okay, and again, this is based on the  
23 unadjusted NMTDB data, correct?

24 A Correct.

25 Q Now, does this not show, Exhibit 124, the

1 particular table we are looking at, that about one-third  
2 of all the trailers sampled were refrigerator trailers,  
3 roughly?

4 A Table V-4?

5 Q Yes.

6 A You mean from the number of observations?

7 Q Yes, it is roughly a third. Is that accurate?

8 A That's what the table shows.

9 Q And does it show that over 85 percent were  
10 vans, flatbeds, or reefers?

11 A I will accept that, subject to check, I  
12 guess. It looks to be largely oriented towards vans,  
13 flatbeds, and reefers.

14 Q Now I would like you to turn to Table 3 of  
15 your own statement, and I will ask you a question on  
16 this same subject. In Table 3 of your statement, you  
17 show length of haul distribution by equipment type.

18 A Just a moment. Oh, here it is.

19 Q First of all, let me ask you, where are  
20 refrigerated vans on your Table 3?

21 A I believe I have included them under Van  
22 Type. I didn't break reefers out separately.

23 Q Oh, I see. It is included within Van?

24 A Yes.

25 Q Can you tell me briefly how you developed

1 Table 3 in terms of the information that you used and so  
2 on?

3 A Well, as it says in Footnote 1, I used 1982  
4 current loaded hauls and the weighting procedures  
5 described in Appendix A to estimate the percentage of  
6 total truck tonnage that fell into the different mileage  
7 block categories by the different equipment types.

8 Q So it would, for example, if you used NMTDB,  
9 it would include, would it not, north-south movements  
10 between California and Oregon on Interstate 5?

11 A It would include all of the movements in the  
12 U.S.

13 Q Could you identify for us, if you know, what  
14 the key commodities or types of traffic that were  
15 involved in TOFC to and from northern California and  
16 Oregon, your central Pacific territory?

17 A Transcontinental moves to and from?

18 Q Yes. It would be fresh fruits and  
19 vegetables? Would they be a major participant in  
20 that?

21 A I believe my Tables 5 and 6 give an indication  
22 of the major TOFC moves by two digit STCC code, if that  
23 helps.

24 Q Do you happen to know offhand whether fresh  
25 fruits and vegetables would be one of the principal TOFC

1 commodities moving to and from your central Pacific  
2 territories?

3 A I believe they would be under STCC 01, yes.

4 Q How about freight forwarder or shipper  
5 association traffic? Is that a fairly large group of  
6 TOFC traffic in your central Pacific territory moving  
7 there?

8 A Well, there are fine distinctions between STCC  
9 Codes 44 through 46, and the volumes differ somewhat by  
10 direction, but I say the indication is there in Table 5  
11 as to which STCC codes correspond to the major TOFC  
12 flows, at least flows over \$10 million.

13 Q In general, would you consider Freight  
14 Forwarder traffic as being similar in any way to stopoff  
15 or multi-drop traffic that motor carriers handle?

16 A Not if the TOFC move is made without stopoffs.

17 Q I am talking about freight forwarder or  
18 shipper association TOFC.

19 A I am not sure I understand the question.  
20 Could you clarify it?

21 Q Well, in your mind, the fact that it is being  
22 moved on behalf of a freight forwarder or shipper  
23 association, does that in your mind make it in any way  
24 similar to stopoff or multi-drop traffic?

25 A Well, it is similar in that it would probably

1 tend to be small shipments, packaged goods, things like  
2 that, but beyond that I have no real basis.

3 Q For multiple customers? Ultimate customers?

4 A Well, I would agree that it represents traffic  
5 that has been consolidated at one particular point from  
6 long haul movement from multiple customers most  
7 likely.

8 Q I want to refer you again to Exhibit 125, the  
9 ICC empty loaded survey. And I want to have you look at  
10 Page 2 of that, Arabic 2, under Objectives. Do you see  
11 that according to the study the main objective was to  
12 rigorously determine the overall percent of empty truck  
13 miles of all trucks having three or more axles?

14 Do you see that?

15 A I see that.

16 Q Would you say that that is the same objective  
17 as the NMTDB was originally conceived as, as we  
18 discussed earlier?

19 A I agree that the objectives as stated differ.

20 Q Now, the larger trucks -- well, wait. I have  
21 a foundation question.

22 Trucks that are going to be handling  
23 commodities over longer distances are apt to be the  
24 larger five-axle trucks, are they not?

25 A I don't believe they are all five-axle, but in



1 general I agree that they are the larger trucks.

2 Q Well, would you agree that the larger trucks  
3 that handle the greater volumes over long distances are  
4 primarily five-axle combinations rather than the smaller  
5 three or four-axle trucks?

6 A I was concerned about this when I initially  
7 contemplated the sampling issues in the NMTDB and the  
8 use of the ICC survey, and I long ago satisfied myself  
9 that they covered essentially the same traffic by  
10 comparing the net loaded weight distributions in the ICC  
11 versus the NMTDB.

12 So, while I agree that there is potentially a  
13 small definitional difference, I have satisfied myself  
14 that it has no practical effect in distinguishing  
15 between the two. My conclusion in observing the loaded  
16 weight distributions was that the ICC had a slightly  
17 higher incidence of lighter loadings, but that the  
18 difference was accountable by the fact that the ICC  
19 survey included LTL traffic while the NMTDB generally  
20 doesn't.

21 So, I satisfied myself that they are sampling  
22 from essentially the same universe.

23 Q So you wouldn't agree, I guess, that the  
24 smaller three-axle truck include what is known as  
25 straight trucks or three-axle semis that are used in and

1 around metropolitan areas for short hauls?

2 A I agree that there exist three-axle trucks  
3 used for such purposes. However, the sampling strategy  
4 used in the ICC survey avoided such local hauls, and  
5 sought to only sample from intercity movements in which  
6 such vehicles are used less frequently.

7 Q Right. Would you agree with me that the  
8 smaller three and four-axle trucks are less likely to be  
9 rail competitive than the five-axle trucks?

10 A In local service or in intercity service?

11 Q Long haul service.

12 A I don't really have a basis for saying that  
13 one way or the other. I have not analyzed it.

14 Q Let's take a look briefly here at Appendix I,  
15 capital I, of the ICC study. It begins at Page 83. I  
16 just wanted you to confirm for me that this is a list of  
17 the segments and checkpoints the ICC sampled.

18 A Yes.

19 MR. SMITH: I want to have distributed as our  
20 next exhibit SFSP-C-126. This is a map of the United  
21 States. And I will represent to you that it is a copy  
22 of a map on which I have or we have affixed a little  
23 sticker for each one of the survey checkpoints  
24 identified in this ICC study, Appendix I.

25 JUDGE HOPKINS: It will be marked for

1 identification.

2 (The document referred to  
3 was marked for  
4 identification as Exhibit  
5 Number SFS2-C-126.)

6 BY MR. SMITH: (Resuming)

7 Q Assuming that I have accurately done that,  
8 based on what the checkpoints were used in the ICC  
9 study, isn't it fairly clear that the ICC study  
10 checkpoints are heavily concentrated in the northeast?

11 A Yes. But it is important to refer to the  
12 formula used to interpret the ICC survey results in  
13 which an adjustment factor for the length of the highway  
14 segment surveyed is included to adjust for just this  
15 consideration.

16 Q Incidentally, do you know that the average  
17 length of the study segments in this ICC survey were  
18 about 150 miles? Does that sound about right?

19 A I will accept that. I understand that their  
20 methodology was to divide the highway network up for  
21 sampling purposes into different segments, and that the  
22 segments were not equal in length, but the adjustment  
23 was made in the interpretation phase by weighting back  
24 by the length of the segment in which different  
25 observations were taken.

1 Q Incidentally, I want to make one minor  
2 clarification. On your Appendix A, Page iii, you state  
3 that the ICC study was conducted at 225 sample  
4 checkpoints spread throughout the intercity portion of  
5 the interstate highway system. But I want you to also  
6 look at Page 59 of the ICC study.

7 I think there, if I am not mistaken, it says  
8 that there were 439 checkpoints and 221 segments.

9 A I believe my figure of 225 came from a list of  
10 segments that you just referred me to a minute ago that  
11 ends on Page 98 and has 225 segments listed. I have not  
12 reconciled whatever discrepancies there may be between  
13 the text and that table.

14 Q But it had actually 439 individual checkpoints  
15 as opposed to -- I think you said there were 225?

16 A Well, for clarification, I would be happy to  
17 insert checkpoints or segments where I have used  
18 checkpoints for conformity.

19 Q I think you already agreed with me that the  
20 ICC is a national -- the results of the ICC study are  
21 total national result? Correct?

22 A They represent a survey of the whole U.S.  
23 movement, whole U.S. intercity truck movement.

24 Q And I believe you also agreed with me earlier  
25 that as to intercity movements in the northeast, you

1 would naturally expect to have a lot shorter length of  
2 truck haul than you would out in the western United  
3 States.

4 A Possibly, yes.

5 Q Do you know, by the way, what the sampling  
6 interval of the ICC study was? Wasn't it one hour?

7 A One hour each time they went out, but I  
8 believe at each location they went out four times per  
9 year in each direction.

10 Q Okay, so the average number of interviews  
11 conducted in that one-hour period was what? Do you  
12 know?

13 A I guess you can start with the total number of  
14 interviews that they collected, which was a little bit  
15 over 13,000, and divided by the number of segments and  
16 the number of hours per segment and get a figure.

17 Q If you accept for hypothetical purposes that  
18 the average number of interviews conducted per one-hour  
19 period works out to be eight, would you then agree that  
20 the average number of interviews completed at a single  
21 checkpoint in a year, four times a year, would be 30 or  
22 32?

23 A I believe at each checkpoint they sampled in  
24 each direction, so that on average it would be  
25 approximately 60.

1 Q Okay. Did you -- in your view did the ICC  
2 study sample the trucks passing these checkpoints  
3 proportional to the flow of traffic past each  
4 checkpoint?

5 A No, but they counted the number of passing  
6 trucks and used that as a weighting factor in  
7 interpreting the results from the survey in a manner  
8 completely analogous to my first weighting procedure.

9 Q And that validates the -- or by doing that  
10 that gives some validation or credibility to the  
11 results?

12 A It is just the results from different segments  
13 to be representative of the universe from which they  
14 were drawn.

15 Q Did you know that the ICC empty loaded study  
16 counted trucks for the sampled hour or, if that wasn't  
17 convenient, for the next following hour?

18 A Yes.

19 Q In your opinion, is that a reliable sampling  
20 procedure, or is that likely to introduce quite a bit of  
21 variance?

22 A I am aware that truck passing counts may vary  
23 somewhat during the day, and while it may introduce some  
24 variance, there are sometimes cases where in doing  
25 something as difficult as this you have to make

1 allowances. There is a difference between introducing  
2 variance and introducing systematic bias. And I don't  
3 believe it introduces a systematic bias.

4 Q Take a look at Page 56 of this ICC survey.  
5 They have a map on that page that defines various  
6 regions of the country.

7 A I have that.

8 Q Can you agree with me that the area of primary  
9 concern in this case in terms of truck hauls and rail  
10 hauls is going to be Regions 5 and 6 west of the  
11 Mississippi roughly?

12 A Could you ask the question again?

13 Q I am just wanting to get you to confirm that  
14 the areas of primary concern in this case for the Rio  
15 Grande would be in regions shown here, Regions 5 and 6,  
16 covering the area west of the river.

17 A I am not sure I can agree with that. The  
18 eastern transcontinental territory that I used in my  
19 analysis is different from Region 5, and Region 6  
20 likewise is substantially different from the CP  
21 territory as defined by Mr. Brainard and shown in my  
22 statement.

23 Q But clearly Rio Grande is not concerned in  
24 this case, is it, about intercity truck movements  
25 occurring that don't enter into Regions 5 and 6 at all?

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1           A     The concern that I address in my statement is  
2 the ability of trucks to substitute for current rail  
3 traffic. I do not consider it relevant as part of that  
4 analysis to examine the truck volumes that you are  
5 talking about, I don't think.

6           I mean, if the rail traffic goes from Region 6  
7 to Region 2, it is of relevance what it would cost to  
8 substitute truck for that movement, and that would  
9 involve trucks moving in Region 2.

10          Q     Okay, but it isn't a relevant analysis, I take  
11 it, in this case as far as Rio Grande is concerned on  
12 traffic from 1 to 2 or 2 to 4, something like that?

13          A     I have defined in my statement the area that  
14 is of interest and that I addressed.

15          Q     Take a look at Page 7 of this ICC study.  
16 There is Table 1A.

17          A     I have that.

18          Q     Down at the bottom it shows by region, does it  
19 not, the number of trucks sampled? And if you will take  
20 a look at Region 5 and Region 6, you will see there  
21 were, if my math is right, almost 3,700 trucks that were  
22 sampled. Do you see that?

23          A     I see that it shows that.

24          Q     You can't tell from this, by the way, can you,  
25 how many of these were long haul five-axle combinations

1 versus three-axle short haul combinations, can you?

2 A No, but as I indicated, I have already  
3 considered whether there is a substantial difference  
4 between the NMTDB sample, which I understand to be  
5 basically the larger trucks, and the ICC sample.

6 I have concluded that overall the ICC sample  
7 is approximately the same and oriented almost entirely,  
8 if not entirely, towards the larger trucks.

9 Q Do you know how many NMTDB sampling locations  
10 there are in the west? And I will tell you I think  
11 there are ten, and maybe you can confirm that that is  
12 right.

13 A I would accept that subject to check.

14 Q I guess you would also probably know from your  
15 work with NMTDB that at each of those locations they  
16 conduct 75 interviews a month, and they do that once a  
17 month, so that would be a total of 900 interviews per  
18 location per year. Is that right?

19 A That's correct.

20 Q So for these ten western NMTDB sampling  
21 locations you would have 9,000 interviews a year,  
22 right?

23 A That is correct.

24 Q And do you also know that each interview that  
25 NMTDB does encompasses data on the current as well as

1 the previous haul?

2 A I am aware that some data on the previous haul  
3 is asked for, and that there are limitations on the  
4 usefulness of some of it. There is an important  
5 distinction in my mind, however, between a large sample  
6 that is biased and a more modest sample that is as close  
7 to unbiased as you can get under the circumstances.

8 And as an analyst who has worked with  
9 transportation survey data for my entire professional  
10 career, I will go with a modest unbiased one over a  
11 large biased one any time.

12 Q Well, I can see you are anticipating where I  
13 am going with this.

14 A I thought I would be direct.

15 Q For the record, I want you to agree with me  
16 then that regardless of what you think in terms of the  
17 bias or the reliability of it, that NMTDB would obtain  
18 data on 18,000 movements a year in the west, because you  
19 have 9,000 interviews times two, because you are taking  
20 each interview encompassing two moves?

21 A I would say that is an upper bound, depending  
22 upon the usefulness of the previous haul information. I  
23 would note that the previous hauls may not necessarily  
24 involve traffic in that same area.

25 Q Sure. And you also know, I take it, that

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1 NMTDB data has been collected now for eight years?

2 A I understand it began in late 1977, so it is  
3 going on eight years, I guess.

4 Q So assuming that it is eight years, and you  
5 have got ten western locations, and 18,000 movements a  
6 year just in the west, if my math is right, that would  
7 mean you would have over that period 144,000 total truck  
8 movements to have data on, and these would be primarily  
9 if not exclusively long haul.

10 A Subject to check of your math, I agree that  
11 the sample is large and extends back to the late 1970's,  
12 and that is one of the strengths of this data base  
13 potentially if you interpret it correctly, that you can  
14 get indications of time series.

15 Q Now, on Page 11 of your statement, you also  
16 refer to the 1977 Census of Transportation and its  
17 finding, I guess you could say, of average length of haul  
18 for motor carriers. Do you see that up at the top? You  
19 also made a correction on that.

20 A Yes.

21 Q That is a national survey, is it not?

22 A Yes, of manufacturing establishments, I  
23 believe.

24 Q Right, so it would include movements in the  
25 northeast as well as everywhere else in the country,

1 right?

2 A Yes.

3 Q And you would expect, would you not, to find  
4 shorter hauls on the intercity movements in the  
5 northeast than you would in the west, right?

6 A To the extent that the cities are closer  
7 together.

8 Q Now, you answered this earlier. It includes  
9 only manufactured products. That is the '77 Census of  
10 Transportation. That would be what, STCC 20 through  
11 39?

12 A I believe they use what they call TCC codes  
13 that correspond approximately to STCC, and there may be  
14 some data on a Code 19, but I believe in general they do  
15 start at 20.

16 Q Okay, so it would not include, for example,  
17 forest products, which is STCC 08, would it?

18 A I would have to consult the Census to see what  
19 they counted versus didn't count under their TCC codes.

20 Q Okay. Well, if TCC code for forest products  
21 were 08, it would not have been counted in this survey,  
22 would it? It is not a manufactured good.

23 A It can be checked. I don't have the list of  
24 Census of Transportation commodities available.

25 Q Are forest products in your opinion a major

1 commodity moving through the Central Corridor today to  
2 and from northern California and Oregon?

3 A I have not analyzed the volume of truck  
4 traffic of that type moving transcontinentally, so I  
5 can't answer that based on my study.

6 Q Isn't it true that your study, all of the  
7 tables you have really don't address the issue of  
8 absolute volume at all, do they?

9 A No, I believe I explained in considerable  
10 detail the difficulty of relying on, only on relative  
11 volume comparisons of that type, and specifically when  
12 you have additional information that gives you better  
13 insight into the substitutability of truck for current  
14 rail traffic, which I believe is the issue here.

15 Q Does not your --strike that.

16 I want to talk some more about this Census of  
17 Transportation from 1977, and have you confirm for me  
18 that since it only includes manufactured products, it  
19 would not include any data on truck movements for fresh  
20 fruits and vegetables, for example, perishables.

21 I think you'll find it's 01.

22

23

24

25

1 A Again, subject to check on that.

2 Q That's also a major commodity moving through  
3 the Central Corridor, isn't it?

4 A I know there is rail traffic. Again, I  
5 haven't analyzed the volume of truck traffic per se.

6 Q In your opinion, does the fact that the '77  
7 Census of Transportation excludes movements of  
8 perishables, fresh fruits and vegetables, in your  
9 opinion would that bias the Census length of haul  
10 towards shorter hauls?

11 A Well, that factor taken in isolation might  
12 omit some longer hauls, as the omission of some bulk  
13 commodities might result in the omission of shorter  
14 hauls.

15 I use this data as one of the few available  
16 independent reasonableness checks, and don't believe  
17 that the specific examples that you are citing would  
18 have a measurable or substantial effect on the  
19 approximate magnitude of the mileages that are shown.

20 Q Look at Table 1 of your statement for a  
21 minute.

22 A I have that.

23 Q I'm happy to report that I think we're all  
24 done with these voluminous exhibits and we can move on.

25 A Great.

1 Q Table 1. In that table you show various STCC  
2 codes, and I note that you have no entry for STCCs 44  
3 and 45.

4 Do you know, is that shipper association and  
5 freight forwarder traffic?

6 A I believe so; yes.

7 Q Okay. And that is not, those are not STCC  
8 codes that motor carriers use, is it? At least it's not  
9 recorded in NMTDB, isn't that correct?

10 A I will accept your representation.

11 Q If you know; do you know whether or not they  
12 use -- motor carriers use those STCC codes?

13 A Well, there's a difference between whether  
14 motor carriers use them in some way and whether Mr.  
15 Baker uses them in recording that type of traffic. I  
16 would suggest that these results show that he doesn't.

17 I have not omitted them.

18 Q I will represent to you that NMTDB does not  
19 use those, does not record those. Now I would like you  
20 to take a look at your Table 5. I notice that you've  
21 got on Table 5, you do show data there for truckload  
22 shipments for STCCs 45 -- I'm sorry, 44 and 45.

23 You have it for rail, obviously, because  
24 that's something that the rails use; right? I would  
25 like to know if you could tell me here on the stand how



1 it was that you were able to get data on truckload  
2 shipments using STCC codes 44 and 45.

3 A I believe I assumed the same net loaded weight  
4 of a full trailer as I assumed for STCC code 46.

5 Q Did you make any adjustments to NMTDB to carve  
6 out somehow additional traffic that would be moving  
7 under 44 and 45 STCC codes?

8 Did you take tonnage or any other volume of  
9 traffic away from the other STCC codes to put it into  
10 STCCs 44 and 45 in Table 5?

11 A Again, I don't move volumes of tonnage  
12 around. I am estimating what the truck rate would be to  
13 move the corresponding rail traffic.

14 Q Okay. So you did not reallocate any tons?

15 A No.

16 Q I just wanted to make sure. If you take a  
17 look at your Appendix A again to your statement on page  
18 Roman II, down on the bottom on footnote 2, you say that  
19 you excluded regular route common carriers from the  
20 relative number of trucks.

21 Could you explain why you did that, briefly?

22 A The NMTDB surveys themselves are generally not  
23 administered to regular route common carriers. They may  
24 be absorbed passing the sampling location, but according  
25 to Mr. Baker, the surveyors make a conscious effort to

1 avoid regular route drivers who stop at BMTDB  
2 locations.

3 So my analysis focuses on the non-LTL type  
4 traffic, the truckload traffic. And that is part of  
5 that focus.

6 Q Okay.

7 Now, throughout your Appendix here, your short  
8 Appendix, you do say that on at least one occasion, you  
9 used the formulas presented in Appendix D of the ICC  
10 survey. And I beg your pardon. I guess I said we were  
11 through with that, and we're not.

12 I would like to have you explain for the  
13 record briefly if you can, how you used the formulas  
14 presented in Appendix D of the ICC Loaded-Empty Survey,  
15 which is Exhibit 125 in your analysis.

16 A First, can you refer me to where I refer in my  
17 statement to Appendix D?

18 Q I'm on Appendix A of your statement.

19 A Correct. And I'm trying to find my  
20 reference.

21 Q The first reference is on page Roman numeral  
22 II under "Passings," second paragraph. "The procedure  
23 is analogous to the weighting factors described in  
24 Appendix D."

25 A Well, Appendix D adjusts for the number of

1 trucks passing the sampling locations. The formula in  
2 the ICC's Appendix D includes an adjustment of that  
3 type.

4 Q Then over here on page Roman numeral III, the  
5 last paragraph on that page, you say: "To correct the  
6 interview subjects' bias in NMTDB, distributions of  
7 empty and loaded by length of haul status were compared  
8 between the ICC's survey with results weighted  
9 consistent with the formula presented in Appendix D of  
10 the ICC report."

11 And I just wanted to know if you can tell us  
12 on the record how it was that you used the formulas in  
13 Appendix D of the ICC report to do that.

14 A I used a computer program that weighted the  
15 ICC observations according to the formula in the ICC  
16 Appendix D that gives an indication of what I interpret  
17 to be the composition of the truck universe, if you were  
18 capable of stopping drivers at random points on the  
19 interstate highway network.

20 And I compared that to the distribution that  
21 you get from the NMTDB if you adjust for the passing  
22 counts factor that is also included in the ICC, and I  
23 take the difference between those two distributions to  
24 be indicative of the propensity of the ICC -- of the  
25 NMTDB sample -- to sample different types of drivers.

1 Q Is the computer program that you used to apply  
2 these formulas in Appendix D of the ICC report, is that  
3 program in your work papers?

4 A It was -- the description of the formula is in  
5 the ICC survey. It was implemented on a program under  
6 my direction by Charles River Associates. It is only on  
7 tape, and I do not believe that tape is in my work  
8 papers, although the formula is in Appendix D.

9 Q Okay.

10 MR. SMITH: I wonder if we could ask at this point,  
11 through counsel -- I don't know if we are going to need  
12 this -- but if we do, would it be possible to obtain a  
13 copy of that program in some usable way?

14 MR. VON SALZEN: Offhand, I can't think of any  
15 reason why that would be a problem. Why don't you let  
16 me know if you decide that you need it, and we'll be in  
17 touch with Charles River Associates and find out what  
18 needs to be done to comply with that request.

19 JUDGE HOPKINS: Thank you.

20 MR. SMITH: Thank you.

21 BY MR. SMITH: (Resuming)

22 Q The next question relates to page Roman  
23 numeral III again of your Appendix A, and the last  
24 sentence there, over onto the top of Roman numeral IV.

25 You say: "It was assumed that the differences

1 observed reflected the differences between the NMTDB and  
2 an approximately random procedure for sampling," and so  
3 on.

4 The question is, what facts led you to  
5 conclude -- led you to that conclusion?

6 A My understanding of the ICC survey methodology  
7 led me to conclude that it is as close as you're going  
8 to get to a random sample. And any differences between  
9 what the NMTDB showed and the ICC were likely traceable  
10 to the differences in the survey methodologies, given  
11 that the NMTDB was not located at random points  
12 throughout the network, it was not located at a large  
13 number of points throughout the network, and that you  
14 have a prior expectation that of the universe of traffic  
15 passing the NMTDB locations, there is not an equal  
16 likelihood of all people stopping.

17 Q And those are the facts that you relied on for  
18 that assumption?

19 A Yes.

20 Q Okay. On page Roman IV, you point out at the  
21 end of that first incomplete paragraph: "NMTDB  
22 generally does not sample regular route common carrier  
23 LTL traffic."

24 My question is, why did you conclude that you  
25 did not need to adjust for the relative proportion of

1 owner-operators because of that fact?

2 A The difference between the composition of the  
3 two surveys with respect to owner-operator and  
4 non-owner-operator was of the approximate magnitude of  
5 the incidence of LTL which is almost exclusively  
6 non-owner-operator.

7 So I took the difference in those two  
8 particular parameters to be caused again by the  
9 differences in the traffic that were sampled.

10 Q All right. Let's shift gears here a minute  
11 and turn to page 26 of your statement. You state there,  
12 right after the footnote 17 reference in the text: "To  
13 the extent truck and carload costs are each relatively  
14 constant per mile, i.e., relatively insensitive to  
15 lading weight," and so on.

16 Do you have any theoretical or empirical  
17 evidence at all to support the contention that carload  
18 costs are relatively insensitive to lading weight?

19 A I do not have a specific analysis of that.  
20 And this phrase says "to the extent that."

21 Q Do you believe that they are relatively  
22 insensitive to lading weight; that is, costs?

23 A I say I have not analyzed it. The statement  
24 has to stand on its own.

25 Q So you have no opinion as to whether that is

1 true, false, or any has any<sub>3</sub> bearing on reality at all?

2 A I believe that to some extent it is true, but  
3 I have not analyzed the magnitude of that extent.

4 Q What else besides lading weight do you believe  
5 that rail carload costs are sensitive to?

6 A It's not really part of my analysis.

7 Q In your capacity as a transportation  
8 consultant, have you discussed logistics trends and  
9 practices with shippers?

10 A No.

11 Q So you are not in the business of advising  
12 shippers on how they might best maximize their  
13 transportation dollars, are you?

14 A No. That has not been part of my practice.

15 Q Do you have any opinion at all, if you were  
16 advising a shipper, that if price and service were  
17 equal, would a shipper be likely to choose between a  
18 larger or a smaller shipment size?

19 A It's a difficult hypothetical to take into  
20 account. There are a lot of factors in inventory theory  
21 that I would not like to railroad over with a hasty  
22 answer and without analyzing it.

23 Q Leaving aside for the moment such commodities  
24 as the heavy bulks -- coal, ore, things like that -- do  
25 you know from your review of the literature or any other

1 source, that generally shippers would prefer smaller  
2 sizes than larger?

3 A I don't believe you can make that sort of  
4 generalization based on observing the market and seeing  
5 what flows. You have some small shipments, and you have  
6 some large ones.

7 Q So, to your knowledge, you don't see any  
8 relationship at all between lower rail rates in certain  
9 cases and shipment size, the shipper's desire for --  
10 preference to have a smaller shipment size, but  
11 willingness to ship in larger quantities in order to  
12 obtain a lower rate?

13 A It's difficult for me to envision that that  
14 type of factor would account for the magnitude of the  
15 differences between truck and rail rates that I  
16 observed.

17 Q Could it be one factor, though?

18 A I don't believe it could be a significant  
19 one.

20 Q In your discussion of rates that begins, I  
21 think, at about page 27 of your statement, are you  
22 contending that shippers of the commodities that you  
23 show in your Table 5, which follows page 27, are you  
24 saying that shippers of those commodities do not use  
25 trucks for transcontinental movements or movements over



1 1,000 miles that don't use trucks?

2 A No, I don't believe I have stated that.

3 Q So, in other words, since you are using NMTDB  
4 as a source, there are actually truck movements in those  
5 over 1,000 mile categories, are there not?

6 A Trucks do move over 1,000 miles, and between  
7 the CP territory and the transcontinental territory;  
8 yes.

9 Q Now, your theory, I understand, is that the  
10 ability of truck's competition to constrain rail rates  
11 depends on the substitutability of truck for rail at the  
12 margin; is that right?

13 A Could you repeat that, please?

14 Q The ability -- your theory, I think, is that  
15 the ability of truck competition to constrain rail rates  
16 depends on the substitutability of truck for rail at the  
17 margin.

18 A I guess it's the phrase "at the margin" that I  
19 have some uncertainty about what you mean.

20 Q Okay. Well, from your Table 5, we know that  
21 despite what you claim are large differences in rates,  
22 shippers do use both rail and truck for the commodities  
23 and distances shown.

24 So my question is, what does your rate  
25 comparison tell us about the proclivity of the marginal

1 rail customer to switch modes if the rail rates rise?  
2 It doesn't tell us anything, does it?

3 A It tells us the cost that would be faced by a  
4 shipper if forced to switch to truck.

5 Q It doesn't tell you anything about -- and you  
6 have already testified, I think, you don't know very  
7 much about what sort of logistics considerations  
8 shippers might take into account, the savings they might  
9 incur by shipping in smaller shipment sizes via truck.

10 A I believe I stated that those considerations  
11 should be minor. I think more significant are the type  
12 of differences described by Dr. Banner in his statement  
13 of September 10th that indicate the generally different  
14 types of circumstances that can affect transportation  
15 requirements within any given two-digit STCC code, and  
16 at times even within five-digit STCC codes.

17 Something that you would refer to as the same  
18 commodity, in fact, has entirely different logistics  
19 requirements. In some cases it may be oriented towards  
20 truck. If it is a high value version of that commodity  
21 moving in packages, possibly among multiple or to  
22 multiple destinations, but within the same commodity,  
23 you may have traffic that is distinctly rail-oriented.

24 Q But there's a lot more to the story, isn't  
25 there? Some more. You won't admit, I guess, that

1 there's a lot more. But the story is more than just the  
2 actual transportation rate that the shipper pays.

3 Don't you also have to examine in some degree  
4 the actual shipper cost, of which the rate is but one  
5 part?

6 A Could you define your use of the word "cost"?

7 Q The actual, the net cost to the shipper of  
8 switching from rail to truck or truck to rail involves  
9 more than considerations of simply rate. There are  
10 logistics costs, for example.

11 A Such factors may be relevant in certain  
12 circumstances. However, I believe that my analysis has  
13 taken into account in a general way service quality  
14 differentials and the value of such service quality  
15 differentials at a general level.

16 Q Can you show me where in your testimony you're  
17 talking about service, the value of service?

18 A I state on page 30 that in the case of single  
19 unit boxcar traffic, at least some single unit boxcar  
20 traffic, that there seem to be fairly small  
21 discrepancies within certain STCC codes between the rail  
22 rates and the -- what I estimate to be the truck rates  
23 that would apply if the same traffic were moved by  
24 rail.

25 I subsequently observe that relative to --

1 well, let me finish. And I conclude, based on that  
2 observation, that it's not necessary for there to be a  
3 major difference, and I'm quoting directly from my  
4 statement "between truck and rail rates for boxcar to be  
5 preferred by at least some shippers."

6 I subsequently observe that relative to single  
7 boxcar rates, I believe that TOFC and multiple unit  
8 traffic both experienced generally higher service  
9 quality at generally lower rates or wider discrepancies  
10 in rates between the rail traffic and the truck traffic.

11 So whatever the small willingness to pay might  
12 be for some general service advantage of truck relative  
13 to rail, that difference cannot possibly account for the  
14 wide rate differences on the vast majority of the  
15 traffic.

16 Q And yet you have never advised a shipper on  
17 logistics.

18 A That is true.

19 Q What is the basis for your conclusion that you  
20 just expressed?

21 A Well, I think it flows directly from the  
22 observation that TOFC service quality in general, with  
23 respect to travel time and reliability and things like  
24 that, is generally superior to single boxcar traffic.

25 And likewise, multiple unit rates,

1 particularly if you're talking about trainload that  
2 moves directly, again is superior in terms of those  
3 important shipper attributes that may be important to a  
4 particular shipper, logistics channels.

5 Q In moving to your discussion of TOFC rates  
6 that begins on 31 and 32, I think, the discussions on  
7 those pages, am I correct in saying that the figures  
8 that you use there are average revenues which you  
9 derived from the carload waybill sample?

10 A Where specifically on page 31?

11 Q Oh, down at the last full paragraph:

12 "However, Mr. Baker's formula -- for example, eastbound  
13 flows in plan 2-1/2 and plan 3." Do you see that?

14 A Yes. That is from the ICC waybill sample.

15 Q And that is an average figure, average  
16 revenues; right?

17 A Per ton mile. 2.4 cents per ton mile.

18 Q I want to show you a document that's already  
19 in the record. It's R. C. Matney's verified statement,  
20 "National Piggyback Services, Inc." This was submitted  
21 on behalf of Union Pacific, verified statement in  
22 support of UP/MP trackage rights.

23 I don't need to have it marked. It is already  
24 in the record. We don't necessarily adopt or sponsor it  
25 by my asking you a question on it either.

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1           But I wanted to have you refer to that  
2 statement and take a look, for example, on pages 6 and 7  
3 and also on Exhibit 1 which is at the end. Mr. Matney  
4 has set out tables of actual TOFC rates and he has them  
5 in each direction, as you can see, between various city  
6 pairs.

7           And if you will note, he has them on a  
8 per-mile basis. Do you see that they sometimes differ  
9 drastically as between direction of travel? Take a  
10 look, for example, on page 6, St. Louis-Denver versus  
11 Denver-St. Louis.

12           A     I see that; yes.

13           Q     All right. And it shows \$1.03 going from St.  
14 Louis to Denver as the average per-mile cost or rate,  
15 and in the other direction it's only 47 cents a mile.

16                     Would you agree that the low figures are at  
17 least in part, the lower of those figures on any  
18 particular direction of flow is accounted for by the  
19 existence of what's been referred to at various times  
20 here as backhaul rates?

21           A     I have no way of endorsing or validating the  
22 derivation of these numbers. So I prefer not to have to  
23 refer to specific numbers here.

24           Q     I just wanted to refer to them, just to get  
25 the sense that in terms of at least one witness'

1 evidence in this case, which we neither adopt nor  
2 enforce either, that there is apparently quite a  
3 difference. And I wanted to have, in terms of the rate,  
4 average rate per mile, depending on the direction of  
5 travel, I just wanted to have you confirm that.

6 A I agree that it is possible to differ by  
7 direction, and that I considered both directions  
8 separately in my analysis.

9 Q Okay. Would you also agree that part of the  
10 explanation as to why such differences could exist, if  
11 they do, by direction, would be as a result of the  
12 existence of backhaul rates?

13 A I think I just said that I agree that rates  
14 may differ by direction. If you mean something special  
15 by backhaul rates, maybe you should define it for me.

16 Q Well, let me ask you, have you ever heard that  
17 term before?

18 A I do not have any particularly esoteric  
19 connotation that I attach to it besides the obvious  
20 one.

21 Q Well, tell me what it is. I just want to make  
22 sure we know that we're on the same wavelength. What is  
23 your understanding of a backhaul rate?

24 A My understanding is it would be a rate set at  
25 a lower level to attract traffic to fill equipment that

1 otherwise would be empty on the backhaul.

2 Q Now, the discounts that are shown on Mr.  
3 Matney's table, if they're anywhere near the kinds of  
4 real rates that one would expect to pay in the real  
5 world, wouldn't an average revenue figure such as you  
6 have used in your analysis reflect a mix of both  
7 front-haul rates and backhaul discounts in any given  
8 direction?

9 A I guess I don't understand how the backhaul  
10 can be in both directions. If there is an equipment  
11 flow imbalance in one particular direction, there might  
12 be a rate difference between the inbound and the  
13 outbound. But that can't explain everything when you  
14 are looking at the rates in both directions.

15 Q Well, for example, there may be an imbalance  
16 in one direction on one type of equipment and an  
17 imbalance in the opposite direction on another type.  
18 Isn't that right?

19 A When you say "another type," it's my  
20 understanding that in general, we're referring to  
21 van-type equipment. That is not overly constrained with  
22 respect to the type of commodity that goes into it.

23 Q Your figure on page 32, you have a figure  
24 there, the very first line on 32, of 48 cents per  
25 ramp-to-ramp mile. Do you see that?



1 A I see that.

2 Q That's the average rate you have calculated  
3 for plan 2-1/2 and plan 3?

4 A That's correct.

5 Q I think you recognize somewhere in here,  
6 either in a footnote or somewhere else in the text, that  
7 for a plan 2-1/2 or plan 3 TOFC shipment, the shipper  
8 actually has to absorb the cost of drayage to the ramp  
9 and then again from the ramp to ultimate destination.

10 Is that right?

11 A Right. But that was not part of the cost that  
12 Mr. Baker referred to in the 75 to 80 cent range that he  
13 stated. He added drayage to that figure, and my 48 cent  
14 figure compares to the 75 to 80 cent figure that he used  
15 for the same transportation.

16 Q All right. So that -- my question, though, is  
17 whether or not the 2-1/2, the plan 2-1/1 and plan 3  
18 rates that you have used in your analysis here include  
19 drayage, and you have answered they do not.

20 A That's correct.

21 Q On plan 3 TOFC, isn't it true that the shipper  
22 must also furnish equipment?

23 A That's correct. Subsequent to the preparation  
24 of my statement, I have estimated, if you turn to my  
25 Table 6 or Table 5, either one will do, Table 6 is where

1 I note that I have not included drayage. And based on  
2 Mr. Baker's data and an assumption on plan 3 of a \$75  
3 allowance for per diem, I estimate that the overall TOFC  
4 rates or revenue per ton mile faced by the shipper would  
5 be approximately 10 to 15 percent higher than I have  
6 indicated solely from the waybill data.

7 Q Is that on a plan 2-1/2 or 3?

8 A No, that's based on a mix of all the different  
9 plans.

10 Q What kind of rail customers are the primary  
11 users of plan 2-1/2 and plan 3? Wouldn't it be shipper  
12 associations and consolidators?

13 A I have not analyzed that specifically.

14 Q Do you agree that there is quite a bit of  
15 shipper association or freight forwarder traffic moving  
16 in TOFC service today in your plan 2-1/2 or plan 3 in  
17 the Central Corridor?

18 A Again, I have not analyzed specifically  
19 differentials in the utilization of different plans by  
20 different shipper types.

21 Q You would agree, wouldn't you, that shipper  
22 associations and consolidators do not own the good that  
23 they ship; correct?

24 A Generally, I guess that's a fair --

25 Q So the actual owner of the goods --

1 A Could you repeat that last statement?

2 Q My question was, do you agree that the shipper  
3 associations and consolidators do not own the goods that  
4 are being shipped? It's their customers who own them.

5 A For freight forwarders, I would agree. For  
6 shippers' associations, I'm not sufficiently familiar  
7 with their detailed workings to know whether they own  
8 the or not.

9 Q Now, the rates that you show here and that  
10 your analysis is based on for TOFC again, those are the  
11 rates that the consolidator, the forwarder, pays the  
12 railroad, not the rate that the forwarder's customer  
13 pays the forwarder; isn't that right?

14 A The rates that I show are the rates drawn from  
15 the waybill.

16 Q And that would be not the rate that the  
17 ultimate shipper, the customer of the forwarder pays;  
18 isn't that right? The owner of the goods, in other  
19 words?

20 A That is possible.

21 JUDGE HOPKINS: Mr. Smith, how much longer  
22 will you be?

23 MR. SMITH: I would say probably -- I'd say no  
24 more than a half hour.

25 JUDGE HOPKINS: We better take a recess at

1 this time for 15 minutes.

2 (Recess.)

3 JUDGE HOPKINS: Back on the record.

4 Mr. Smith.

5 THE WITNESS: Could I finish answering the  
6 last question that had been asked?

7 BY MR. SMITH: (Resuming)

8 Q I don't even remember what it was.

9 A It was, I believe it concerned whether  
10 shippers paid, in the end, paid higher rates than  
11 indicated on the rail waybill data for shipments that  
12 were consolidated through shippers' associations or  
13 freight forwarders.

14 And I agreed that they did, and I just wanted  
15 to clarify that that was to cover the cost of the  
16 consolidation activity and that the rate differences  
17 that I list, I believe, would still represent the rate  
18 differences that would be faced by the shipper  
19 association or freight forwarder, once the movements had  
20 been consolidated.

21 Q And if the shipper did not ship through a  
22 consolidator, he would have to absorb those costs  
23 himself; right?

24 A It would be an LTL type shipment that would  
25 have its own consolidation costs built in and covered by

1 the rate paid for that.

2 Q Now, I wasn't here and have only seen the  
3 transcript. Did you hear Mr. Matney testify last  
4 Friday?

5 A I did not.

6 Q So you don't know, for example, what his  
7 testimony was as to the percent markup, we can call it,  
8 that the consolidator charges the owner of the good for  
9 those services?

10 A No, I don't know.

11 Q I want to distribute now, one last -- it's not  
12 an exhibit because it's already in the record. This is  
13 a figure from the verified statement of Mr. Spero which  
14 was in JP/MP-26, introduced by Union Pacific in this  
15 record. I believe the figure is A-4 -- I can't quite  
16 read it -- from Mr. Spero's statement, purporting to  
17 show truck and TOFC rates on canned goods from Modesto.

18 A And I will tell you that, according to Mr.  
19 Spero, these rates shown in his table include all TOFC  
20 costs, including pickup and delivery.

21 I wanted to ask you if you can see from the  
22 table that these rates cover shipments of canned goods,  
23 which is one of the commodities shown in your Table 7  
24 and identified by Dr. Carlton.

25 A I note from the title that the table relates

1 to the Applicants' shipper preference model. I don't  
2 really know where these rates are coming from. I'm not  
3 familiar with this analysis. I can't really say anything  
4 based on it.

5 Q Well, I just wanted to ask you -- and again,  
6 I'm in the same position you are, on behalf of  
7 Applicants. I'm not sure exactly where these are from,  
8 but in any event, assuming for the purpose of these  
9 questions that these are accurate, we both have to  
10 assume that.

11 A Okay. It states that. It relates to canned  
12 goods. That's about all that I can say.

13 Q And these are the rates apparently for  
14 shipments from Modesto, which is in what you have  
15 defined as Central Pacific territory; correct?

16 A Modesto is in the territory. Whether or not,  
17 or where these rates came from, I used the rates from  
18 the waybill data in my study.

19 Q Right.

20 Let's take a look at your Table 6, keeping in  
21 mind that I'm coming back to Mr. Spero's table. But in  
22 your Table 6, you show, I believe, that shippers on STCC  
23 20 would face, potentially face 131 percent rate  
24 increase if they had to go from TOFC to truck.

25 A That is for eastbound.

1 Q Okay, eastbound. Right. And that's what --  
2 Mr. Spero's table apparently is eastbound also;  
3 correct? It shows various eastern destinations on the  
4 left.

5 A It appears to.

6 Q Now, my question is, looking at Mr. Spero's  
7 table, isn't it quite clear that his data do not support  
8 your contention that there would be 131 percent price  
9 increase?

10 A I describe the data that I rely on to get my  
11 figure. Where he came up with his figures, I can't  
12 vouch for. I agree that there is a difference between  
13 them, but I have to stand on my own analysis.

14 Q Let me ask you this. In your analysis of the  
15 revenue per ton mile for rail versus truck shipments in  
16 general, when you developed the measurements for the  
17 rail shipments, you used, I take it, the mileages that  
18 were given on the rail waybill sample?

19 A That's correct.

20 Q Do you have any idea whether or not the rail  
21 mileages on that source are circuitous compared to  
22 highway?

23 A I believe Professor Levin has offered a figure  
24 of approximately 5 percent circuitry. Subsequent to the  
25 preparation of my statement, I have made an informal

1 investigation and would confirm that that seems to be  
2 approximately reasonable.

3 Q So that circuitry adjustment, whatever it is,  
4 whether it's 5 percent or whatever percent, would have  
5 some impact on your findings, wouldn't it?

6 A I don't believe it would have a material  
7 effect.

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1 Q Take a look at page 32 of your statement. You  
2 have a Conclusion No. 2. Basically it says that it can  
3 be inferred that factors other than motor carriers such  
4 as intramodal competition currently provide the most  
5 significant discipline to rail pricing and service  
6 decisions for this traffic.

7 Do you see that?

8 A Yes.

9 Q Are you implying that that conclusion that  
10 intramodal competition places a strong restraint on  
11 competitors in the same mode?

12 A Could you repeat that question?

13 Q Yes.

14 Does that conclusion mean that intramodal  
15 competition places a strong restraint on competitors in  
16 this same mode?

17 A My conclusion is that intramodal competition  
18 is affecting TOFC rates in the subject territory. That  
19 is my only conclusion that I am stating here.

20 Q In Table 5 of your statement for STCC Code  
21 eastbound, let's take 01, you have a box rate of .0286.

22 Do you see that?

23 A Yes, I see that.

24 Q In your opinion, what would happen if one rail  
25 competitor had a rate of \$2.86 per ton mile on the

1 Central Corridor and another rail competitor raised its  
2 rate to the three cents per ton mile level?

3           Would you consider that the rail rate of \$2.86  
4 is a constraint on the three cent rate?

5           A     You are saying \$2.86 per ton mile, and I  
6 believe you mean 2.86 cents.

7           Q     I'm sorry, 2.86 cents, I'm sorry.

8           A     And could you restate the question?

9           Q     The question is what would happen if the 2.86  
10 cents per ton mile was the rate that one rail competitor  
11 had, okay, do you consider that rate to be a constraint  
12 on the ability of another rail competitor in the same  
13 corridor to raise the rate to, let's say, 3 cents?

14          A     Well, my 2.86 cents reflects the actual rates  
15 in the subject territory. I have not conducted a  
16 specific analysis of the hypothetical that you postulate  
17 here. I believe it is possible for there to be modest  
18 differences that may apply to specific movements if one  
19 railroad can serve a particular shipper while another  
20 one can't. To obtain boxcar service, you may have to  
21 engage in some kind of reload, and there could be cases  
22 where there would be small modest differences in rates.

23          Q     Well, I guess I am coming back, then, to your  
24 conclusion No. 2 on page 32 where you talk about  
25 currently intramodal competition provides the most

1 significant discipline to rail pricing.

2           Would you explain what you mean by that?

3           A     I am referring specifically to TOFC here.

4           Q     Okay. Well, we could do the same thing for  
5 TOFC where you have got the .0155, do you see that, for  
6 STCC 01?

7           A     Yes.

8           Q     The question there would be would that rate  
9 constrain the ability of another rail carrier handling  
10 the same commodity via TOFC in the Central Corridor, to  
11 raise it, let's say, to .02? Isn't that what the  
12 discipline is?

13          A     The details of the constraints that TOFC  
14 pricing by one railroad imposes on another are fairly  
15 complicated, I believe, and are beyond the scope of my  
16 analysis. They are related to the locations of the  
17 specific ramps and the amount of drayage that would be  
18 involved.

19                 I simply indicate that these are the rates  
20 according to the waybill and that they are far below the  
21 truck rates that would apply to the same type of  
22 movement, and that this appears to reflect at a general  
23 level intramodal competition for this traffic.

24          Q     Can you describe for us the current routing  
25 combinations in the Central Corridor? You have UP as a

1 single system as one choice.

2 A Yes.

3 Q And you have the SP-UP, SP-Ogden-UP as a  
4 second choice.

5 A I believe that there is very little traffic  
6 moving that way right now, and there is SP-Ogden-Rio  
7 Grande.

8 Q Right. And there would also be WP-Rio  
9 Grande.

10 A Again, that interchange volume has declined  
11 precipitously in the wake of the UP merger.

12 Q But your data here are based on the 1982  
13 waybill sample. So all of those routing options did  
14 exist and were used at that time, correct?

15 A Yes, this is drawn from 1982.

16 Q And then those four routes were available and  
17 being used at that time, correct?

18 A Are we talking specifically about the TOFC  
19 traffic?

20 Q Well, for all rail traffic.

21 A I would agree that the routes were there in  
22 '82.

23 Q Is it possible, then, that some of the waybill  
24 sample cents per ton mile that you use in your revenue  
25 analysis were developed from movements that were either

1 totally UP or UP-WP at that time, or totally Rio  
2 Grande-JP moves, in other words, movements in which  
3 Santa Fe or Southern Pacific did not participate at  
4 all?

5 A Yes. This is the total universe of rail  
6 traffic.

7 MR. SMITH: I think I am going to stop there,  
8 and I thank you very much.

9 JUDGE HOPKINS: Thank you.

10 Any redirect?

11 MR. VON SALZEN: No redirect, Your Honor.

12 JUDGE HOPKINS: Thank you.

13 Do you move the admission --

14 MR. VON SALZEN: The next witness is Mr.  
15 Nelson along with Dr. Banner, and I do move the  
16 admission.

17 JUDGE HOPKINS: Any objection?

18 MR. SMITH: No, and I move the admission of  
19 k122 through 125.

20 JUDGE HOPKINS: Any objection?

21 MR. VON SALZEN: No objection.

22 JUDGE HOPKINS: All those exhibits will be  
23 received in evidence.

24 (The documents referred to,  
25 previously marked Exhibit

1 Nos. SFSP-C-122, SFSP-C-123,  
2 SFSP-C-124, SFSP-C-125 for  
3 identification, were  
4 received in evidence.)

5 JUDGE HOPKINS: The next witnesses?

6 MR. SMITH: I am sorry, I left one out. 126  
7 would be also moved.

8 JUDGE HOPKINS: That will be received in  
9 evidence.

10 (The document referred to,  
11 previously marked Exhibit  
12 No. SFSP-C-126 for  
13 identification, was received  
14 in evidence.)

15 Whereupon,

16 MICHAEL A. NELSON,

17 PAUL H. BANNER

18 called as witnesses by counsel for Denver & Rio Grande  
19 Western Railroad and, having been previously duly sworn  
20 by the Administrative Law Judge, were examined and  
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. VON SALZEN:

24 Q Dr. Banner, Mr. Nelson, do you each have  
25 before you the verified opposition statement of Paul H.

1 Banner and Michael A. Nelson filed December 10, 1984 in  
2 Volume DRGW-23?

3 A (WITNESS NELSON) Yes.

4 A (WITNESS BANNER) Yes.

5 Q And do you wish to make any changes to the  
6 statement at this time?

7 A (WITNESS NELSON) Yes, there is one change.  
8 Table 2, the title should read --

9 Q What page is that?

10 A (WITNESS NELSON) It comes after page 7, and  
11 the title should read "Traffic  
12 Flows-California-Oregon-CP Territory to Eastern  
13 Transcontinental Territory." Insert the words  
14 "California-Oregon."

15 Q Are there any other changes?

16 A (WITNESS NELSON) No.

17 Q As so changed, is the statement correct and  
18 accurate to the best of your knowledge and belief,  
19 Messrs. Banner and Nelson?

20 A (WITNESS NELSON) Yes.

21 A (WITNESS BANNER) Yes.

22 Q And do you adopt it as your testimony in these  
23 proceedings?

24 A (WITNESS NELSON) Yes.

25 A (WITNESS BANNER) Yes.

1 MR. VON SALZEN: I have no further questions.  
2 The witnesses are available for cross  
3 examination.

4 JUDGE HOPKINS: Mr. Wilson?

5 CROSS EXAMINATION

6 BY MR. WILSON:

7 Q Good afternoon, gentlemen, Dennis Wilson  
8 representing the Applicants.

9 Dr. Banner, at page 3, the statement points  
10 out that the original diversion matrix and original  
11 diversion exclusion criteria of the DNS model were  
12 modified substantially by Applicant's rail traffic  
13 experts.

14 Are you saying you believe the original DNS  
15 diversion matrix and exclusion criteria would have done  
16 a better job than the more involved, complex model which  
17 was used in this case?

18 A (WITNESS BANNER) May I ask Mr. Nelson to  
19 comment on that?

20 Excuse me, do you mind if I refer certain  
21 questions which Mr. Nelson can answer?

22 Q Fine.

23 A (WITNESS NELSON) We are simply stating here  
24 that the original matrix and criteria were changed  
25 during the course of the Applicant's study.



1 JUDGE HOPKINS: Would you speak up a little  
2 bit?

3 I know it is a long day, but try to speak up.

4 BY MR. SMITH: (Resuming)

5 Q I understand that that is what your statement  
6 says. My question is do you believe that the original  
7 diversion matrix and exclusion criteria would have done  
8 a better job of projecting traffic diversions than the  
9 study that Applicants performed in this case?

10 A (WITNESS NELSON) Well, our analysis is of the  
11 Applicant's study as it was performed. We have no basis  
12 upon which to assess whether or not the original model,  
13 left by itself or run with different assumptions, would  
14 have produced a better result. It would be a function  
15 of the assumptions and changes made.

16 Q Mr. Nelson, are you familiar with the  
17 assumptions of the diversion exclusion criteria and  
18 diversion matrix that are in the basic DNS model?

19 A (WITNESS NELSON) I am familiar with the  
20 criteria that were used in the early iterations of the  
21 Applicant's study and how they were changed in the SFSP  
22 merger iteration

23 Q Okay, what about the basic DNS model that DNS  
24 markets to rail clients in general? Are you familiar  
25 with that?

1           A     (WITNESS NELSON) I would say no, I don't have  
2 a detailed knowledge of it, no.

3           Q     Okay.

4                     Now, I guess this probably should go to you,  
5 too, Mr. Nelson.

6                     You state on page 4 that for a manual traffic  
7 study, a traffic officer can testify and articulate the  
8 reasons for his judgments.

9                     Are you aware that two traffic experts  
10 participated in developing the assumptions and rules  
11 that were used in the rail traffic study Applicants did  
12 in this case?

13           A     (WITNESS NELSON) I am aware of that. I  
14 believe Dr. Banner is more qualified than I to discuss  
15 the role of the traffic officers in such studies in  
16 general.

17           Q     Okay, Dr. Banner, are you aware that two  
18 traffic officers participated in the traffic diversion  
19 study?

20           A     (WITNESS BANNER) I believe two traffic  
21 officers as well as other people participated in the  
22 study, and I don't think one can point out to any  
23 decisions that any one of them made. However, in the  
24 Denver Rio Grande study, which is more like a  
25 traditional traffic study, there was one person

1 responsible who was available to you for cross  
2 examination on each move.

3 Q Yes, sir.

4 Well, the two traffic officers who  
5 participated for Applicants were also made available for  
6 cross examination, were they not?

7 A (WITNESS BANNER) They were available for  
8 cross examination, but the way in which decisions were  
9 made are not on individual carload items, so that you  
10 couldn't pick out a carload such as in the traditional  
11 traffic study, take all of the aspects of that one  
12 carload and cross examine the person making the  
13 decisions on that particular carload.

14 Q Yes, sir. Dr. Banner, but you could review any  
15 individual movement, ask the traffic officer what the  
16 reasons were for the diversion judgment for that  
17 movement, and he could explain just like in a regular  
18 traffic study, isn't that right?

19 A (WITNESS BANNER) No. I don't think that  
20 would be the case. The decisions of the persons  
21 participating in the model reiteration were making  
22 adjustments to the model as it went along, and they were  
23 not making the judgments in the same manner as the  
24 traditional study in which a single waybill is pulled  
25 and that traffic officer is queried on that particular

1 move.

2 Q Okay.

3 Well, as far as the assumptions were  
4 concerned, starting on with the assumptions, the  
5 assumptions were developed in the same way as a  
6 traditional traffic study, were they not?

7 A (WITNESS BANNER) It is not the way the  
8 assumptions were developed but the method as to how the  
9 model was used. I think Mr. Nelson can describe how the  
10 model was used, but in our statement here there are  
11 various limitations described as to why the way the  
12 model was used would not give the same, would not  
13 necessarily give the same conclusions of a traffic  
14 officer, and I think the differences in the model are  
15 outlined on the succeeding pages in our statement.

16 Q Yes, sir. I understand you disagree with some  
17 of the assumptions in the study process, but my question  
18 is could not Applicants' traffic officers be asked  
19 questions about how the assumptions apply to the  
20 individual movements involved in the study, just like a  
21 regular traffic study?

22 A (WITNESS BANNER) The order in which these  
23 decisions were made in the model precludes the same type  
24 of analysis such as mentioned on page -- diversion  
25 routes are the second best. There are various

1 assumptions made in the procedure of carrying out the  
2 model, and it is the model which establishes the  
3 methodology and how the individual persons utilize the  
4 model which affect the results, whereas for the  
5 individual traffic officer dealing with an individual  
6 movement, everything is included in his review, and he  
7 is then subject to cross examination on that.

8 I think the analysis of the treatment of  
9 various changes in the post -- in the prediversion  
10 model, the order in which these decisions were made in  
11 the model comes to different results than that which  
12 would be contemplated by an individual traffic officer.  
13 So you have to consider the order in which things were  
14 done in the model and what decisions were made as to how  
15 the model was used.

16 Q Aren't you really saying that the results are  
17 different because the assumptions used in the study are  
18 different than the assumptions you think should have  
19 been used?

20 Aren't we just arguing about different  
21 assumptions?

22 A (WITNESS BANNER) No.

23 A (WITNESS NELSON) Well, I think there's a  
24 couple of points here. The principal differences  
25 between the manual study and the Applicants' study we

1 describe on pages 4 and 5 of our statement, actually  
2 going on to page 6 also, and the differences are that  
3 the model only picks a single candidate route and has to  
4 analyze different changes in sequence, just as the  
5 nature of its structure, unlike a traffic officer who  
6 could take all the factors into account simultaneously,  
7 and I believe Mr. Swain testified that the model could  
8 come out with different results depending upon what  
9 order you analyzed a particular set of changes, even if  
10 all the changes effectively took place at the same  
11 time.

12 Q Do you think that the model required an  
13 analysis of the various factors affecting shipper  
14 routing decisions in sequence?

15 A (WITNESS NELSON) Our statement is that it is  
16 a requirement of the model that the changes be analyzed  
17 in sequence rather than simultaneously as a traffic  
18 officer would have been able to do.

19 Q Well, what do you mean by changes? Are you  
20 talking there about the consolidations that were studied  
21 or are you talking about the factors that affect shipper  
22 routing decisions?

23 A (WITNESS NELSON) I am talking about the four  
24 changes that were analyzed by the model and the  
25 Applicants between your prediversions preadjustments and

1 postadjustments prediversions data bases, the four  
2 changes in the network, to reflect post-1982  
3 conditions.

4 Q What about the factors affecting the shipper  
5 routing decisions for the SFSP merger? Those factors  
6 did not have to be considered sequentially, did they?

7 A (WITNESS NELSON) I'm not sure I understand  
8 the question.

9 Q Well, the various factors such as equipment  
10 ownership, origin-destination status, class of traffic,  
11 efficiency of the route, those factors were all  
12 considered together just like in a regular traffic  
13 study, isn't that right?

14 A (WITNESS NELSON) They are all combined in the  
15 calculation of the diversion percentages.

16 Q Now, Dr. Banner, didn't Applicants' traffic  
17 officers state in their testimony all of the assumptions  
18 that they used in their traffic study so that they could  
19 be cross examined on whether these assumptions were  
20 correct or incorrect?

21 A (WITNESS BANNER) I believe the assumptions  
22 are stated in generality, but they are not applicable or  
23 there is no variability to them according to the  
24 individual movement. If you take car supply, for  
25 example, in one particular movement, the assumption

1 might be quite different because of what you know. The  
2 individual traffic officer, knowing that particular  
3 movement, can exercise his judgment. The model does  
4 have a generic, across-the-board statement in its  
5 logic.

6 Q On the issue of car supply, Dr. Banner,  
7 doesn't the model make exceptions based on the type of  
8 equipment ownership and make exceptions for pooled  
9 cars?

10 A (WITNESS BANNER) I believe there are  
11 adjustments, yes.

12 Q Sir, are you aware that neither of Applicants'  
13 traffic officers were asked any questions about the  
14 reasons for the diversion evaluations of any of the  
15 movements in the study?

16 A (WITNESS BANNER) I cannot answer that. I did  
17 not read it. I was not here.

18 Q On page 4, Mr. Nelson, to get to some of the  
19 criteria you were listing, one of the ones you state is  
20 the criteria that friendships are of overriding  
21 importance.

22 First, for how many shipments are friendship  
23 of overriding importance in shipper routing decisions?

24 A (WITNESS BANNER) I believe I can answer  
25 that. It can occur. I have seen it occur. And



1 therefore it is something that a traffic officer would  
2 take into consideration.

3 In how many cases? It would be dependent upon  
4 the railroad, the person, the traffic officer.

5 Q Would it be greater than 1 percent of the  
6 traffic?

7 A (WITNESS BANNER) I cannot give you a  
8 percentage. I do know that when I was chief traffic  
9 officer of a railroad, I was told by various shippers  
10 that a person I had in my employ was extremely valuable  
11 to them, and that anything that happened to him they  
12 would take askance. I couldn't quantify it because I  
13 was afraid to.

14 Q In using a rationale like friendships, what  
15 does that really mean?

16 A (WITNESS BANNER) It means the judgment of the  
17 chief traffic officer.

18 Q Aren't friendships really just a function of  
19 various factors in terms of the service provided by the  
20 railroad?

21 A (WITNESS BANNER) They are a function of many  
22 factors, all weighted in some way, and they possibly can  
23 be weighted differently by the shipper and by the  
24 railroad.

25 Q Wouldn't it be more precise to look directly

1 at the factors that affect the so-called friendships  
2 rather than to talk about friendships as a general kind  
3 of amorphous concept?

4 A (WITNESS BANNER) It would be if you could  
5 identify each and every one of them, and they might vary  
6 according to the person and the railroad.

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1 Q Mr. Nelson, the statement on Page 4 that you  
2 are talking about also says that there are cases where  
3 shippers wish to retain a number of carrier routings to  
4 preserve competition. Why won't this factor protect Rio  
5 Grande's participation in Central Corridor routings  
6 after the SPSF merger?

7 A (WITNESS NELSON) I believe Dr. Banner  
8 discussed that earlier.

9 Q He has discussed that earlier. What is your  
10 answer to that, Mr. Nelson?

11 A (WITNESS NELSON) I accept Dr. Banner's  
12 statement during his cross examination on this subject.

13 Q You have no other knowledge?

14 A (WITNESS NELSON) Nothing to add to what he  
15 said already.

16 Q Sir, couldn't shippers use their influence to  
17 make sure that SPSF keeps rail routes open and joint  
18 rates competitive via Ogden?

19 A (WITNESS BANNER) I believe I answered that  
20 this morning.

21 Q You did. I am asking Mr. Nelson his  
22 opinion.

23 A (WITNESS NELSON) I have nothing to add to his  
24 statement.

25 Q So you have no idea of whether shippers have

1 influence on rail routings? Is that right?

2 A (WITNESS NELSON) Well, our analysis of the  
3 way bill data indicates the SP's influence over  
4 routings.

5 Q Well, in terms of your familiarity with rail  
6 traffic markets, are you familiar with any situations  
7 where shippers have influence over rail traffic  
8 routings, Mr. Nelson?

9 A (WITNESS NELSON) I rely on Dr. Fanner for  
10 most judgments regarding rail traffic markets and --

11 Q Is it your testimony that you do not know  
12 whether shippers influence rail traffic routings or  
13 not?

14 A (WITNESS NELSON) I have observed the apparent  
15 influence of the SP in the actual traffic flow data.  
16 Beyond that, I don't have any particular specialized  
17 knowledge about the relative role of shippers.

18 Q Okay, so you have no knowledge of shipper  
19 influence over routings. Is that right?

20 A (WITNESS NELSON) Well, except to the extent  
21 that I can observe the SP's influence.

22 Q Now, Mr. Nelson, in Table 1 you give an  
23 example of a movement where the diversion route chosen  
24 by the model is not the best diversion route. With  
25 regard to this record, how many carloads were

1 involved?

2 A (WITNESS NELSON) I would have to check Mr.  
3 Swain's work papers for the details. I don't have it  
4 here.

5 Q Were there any other carloads in the study  
6 moving from Gary, Indiana, to Milpitas via the St. Louis  
7 gateway?

8 A (WITNESS NELSON) I do not know. We presented  
9 this as being a general illustration of, first of all,  
10 this exclusion criterion, which applied to, as I recall,  
11 approximately 1,900 way bills, and furthermore, as an  
12 illustration of the more general problem that if the  
13 candidate route ran afoul of any of the exclusion  
14 criteria, most of which related to the characteristics  
15 of the diversion route, that the model did not go back  
16 and pick another route that might not violate the  
17 criteria.

18 Q Do you know whether or not this is auto parts  
19 traffic?

20 A (WITNESS NELSON) I do not know. I would have  
21 to check the work paper.

22 Q What would you suppose a shipment from Gary to  
23 Milpitas was, Dr. Banner?

24 A (WITNESS BANNER) A good possibility is that  
25 it would be automobile parts, but I don't know. It

1 could be checked, I presume, in the work papers.

2 Q If the diversion which you suggest, the  
3 diversion route which you suggest were considered in the  
4 study, wouldn't the diversion matrix classify this  
5 movement as a non-diversion anyway, a zero percent  
6 diversion anyway?

7 Either of you can answer that if either of you  
8 know.

9 A (WITNESS NELSON) Because of Rule 108?

10 Q No, sir, because of the automobile traffic  
11 treatment in the diversion matrix.

12 A (WITNESS BANNER) Can you answer that?

13 A (WITNESS NELSON) I don't know.

14 Q Are you aware of the special cells in the  
15 diversion matrix that deal with automobile traffic?

16 A (WITNESS NELSON) I am aware that there is  
17 some special treatment of automotive traffic.

18 Q Based on your analysis, how many movements in  
19 applicant's study involve the choice of the wrong  
20 diversion route?

21 A (WITNESS NELSON) We present data showing a  
22 number of way bills that ran afoul of one or another of  
23 the exclusion criteria, and for all of those, no other  
24 route that might not run afoul of the criteria was  
25 chosen.

1 Q That is true, but that is not an answer to my  
2 question. Are there any other specific movements where  
3 you have found a situation where the model chose the  
4 wrong diversion route?

5 A (WITNESS BANNER) The model takes the first  
6 diversion route and does not consider a second best, and  
7 therefore there wouldn't be any cases showing up where I  
8 don't think you would say it took the right one or the  
9 wrong one. It took only one.

10 Q As long as the diversion route chosen by the  
11 model is the route that the shipper would choose if he  
12 is going to divert the traffic, there is no problem with  
13 that route. Isn't that right?

14 A (WITNESS BANNER) No, it is not right. The  
15 diversion route that you have chosen here is the first  
16 diversion route that the model would have chosen. A  
17 traffic officer looking at the way bill that went from  
18 the origin to destination would have looked at all the  
19 various alternatives as to what would have happened.

20 My conclusion here is that the SFSP would have  
21 diverted this traffic 100 percent, and I would have  
22 chosen this as a diversion by the second best route.

23 Q Yes, sir. I understand you disagree with this  
24 particular movement. My question -- well, I have  
25 several questions now, unfortunately.

1           The traffic evaluator only chooses a single  
2 diversion route, doesn't he?

3           A       (WITNESS BANNER) He chooses one ultimately,  
4 but in his mind he considers all of the alternatives.

5           Q       Okay, and then the DNS diversion model,  
6 through the process of the weighted mile impedences that  
7 you discuss in your statement, looks at all possible  
8 routes, and they chose an ultimate diversion route.

9           My question is, other than this one example,  
10 was there any other example where you thought the route  
11 chosen by the DNS diversion model was the wrong route?

12          A       (WITNESS BANNER) The process of successive  
13 iterations here of choosing this route precludes its  
14 being reviewed for any other diversion.

15          Q       Well, sir, you had 4,500 movements available  
16 on printouts to look at, and that is where you found  
17 this one, which you say is wrong. Did you find any  
18 others?

19          A       (WITNESS BANNER) I think Mr. Nelson can --

20          Q       Did either of you find any others that were  
21 wrong?

22          A       (WITNESS BANNER) The technical problem here  
23 of the procedure.

24          A       (WITNESS NELSON) I believe that other  
25 examples exist of this. This is the one that we have



1 put in our statement. It is intended to be an example  
2 of the general problem.

3 Q And I can see that this is not a good  
4 diversion route choice. If you have any other examples,  
5 I would appreciate it if you could tell us, so that when  
6 we rerun the model, we fix it.

7 A (WITNESS NELSON) Well, again, we cite it as  
8 being more of a potentially generic problem of the  
9 methodology, and not with specific regard to this one  
10 instance.

11 Q Dr. Banner, Table 2 describes traffic flows  
12 from CP territory to eastern transcontinental  
13 territory. Is the eastern transcontinental territory  
14 the same as the one I discussed with you this morning?

15 A (WITNESS BANNER) It is.

16 Q And the CP territory has now been amended to  
17 California-Oregon. Is that the California-Oregon part  
18 of the CP territory that we talked about this morning?

19 A (WITNESS BANNER) Yes.

20 Q And the reason for the amendment was that you  
21 excluded Nevada and Utah traffic in preparing Table 2.  
22 Is that right?

23 A (WITNESS BANNER) Yes.

24 Q Is that the case both for the charts on the  
25 applicants' way bill sample and the ICC way bill sample,

1 or was there a difference in the universe for these two  
2 charts?

3 A (WITNESS NELSON) No, it is the same for  
4 both.

5 Q Why does Table 2 only reflect eastbound rail  
6 traffic, Dr. Banner?

7 A (WITNESS BANNER) Mr. Nelson?

8 A (WITNESS NELSON) We were examining the  
9 proposition regarding the shipper versus the SP's  
10 influence over routings. And we chose this traffic to  
11 analyze that.

12 Q Dr. Banner, did you assume that the purpose of  
13 applicants' adjustments to the 1982 traffic data base  
14 was to reflect 1983 actual rail traffic flows?

15 A (WITNESS NELSON) We understand that the  
16 intent was to capture the longer run effects -- we  
17 believe that the intent was to capture the longer run  
18 effects of the UP merger. But I believe in Footnote 4  
19 on Page 8 we address the issue of whether the long run  
20 has already been reached in 1983, and conclude that it  
21 has.

22 Q In comparing Tables 2 and 3, a number of  
23 changes are reflected, including changes in the  
24 economy. Were any adjustments made to Table 3 to  
25 eliminate changes in the economy between 1982 and 1983,

1 Mr. Nelson?

2 A (WITNESS NELSON) You say between 1982 and  
3 1983.

4 Q And between 1982 and the first six months of  
5 1984, for that matter.

6 A (WITNESS NELSON) We are talking about within  
7 Table 2?

8 Q Within Table 3. Were there any adjustments  
9 within Table 3 to take out the effects of changes in the  
10 economy in overall rail traffic levels during the time  
11 periods that you show on Table 3?

12 A (WITNESS NELSON) Table 3, no. These data  
13 were supplied by Mr. Brainard and are the actual Rio  
14 Grande interchange volumes.

15 Q Do you know how much of the SP-Rio Grande  
16 traffic increase shown in Table 3 was a result of the  
17 improved economy from 1982 to the period of the end of  
18 '83 and the beginning of '84 that you show in Column 4?

19 A (WITNESS NELSON) We haven't conducted a  
20 specific analysis of that, but the change in the  
21 interchange patterns is readily apparent even without --

22 Q Would you agree that a good proportion of that  
23 traffic growth is probably the result of overall traffic  
24 growth in the western railroads between '82 and the  
25 period shown in Column 4?

1 A (WITNESS NELSON) I believe the changes in the  
2 actual volumes could be discerned from Table 2 that has  
3 the actual way bill data in it for the last half of 1983  
4 on a comparable basis to the last half of '82, so it  
5 could be analyzed based on those data. We have not done  
6 so.

7 Q Mr. Nelson, is Table 3 the same traffic  
8 universe, your CP territory, California, Oregon, to  
9 eastern transcontinental territory?

10 A (WITNESS NELSON) No, it is all Rio Grande  
11 interchanges, I believe. You may want to confirm that  
12 with Mr. Brainari.

13 Q So the figures in Table 3 are not directly  
14 comparable to the figures in Table 2, are they?

15 A (WITNESS NELSON) No.

16 Q Mr. Nelson, at Page 9, at the top, you  
17 criticize the fact that applicants assume that no  
18 traffic would be diverted away from Ogden and East St.  
19 Louis, but first I will focus on Ogden.

20 As a result of SP's acquisition of trackage  
21 rights between Kansas City and St. Louis, don't the CP  
22 conditions apply to this traffic?

23 A (WITNESS NELSON) Our statement is only that  
24 the model was programmed to show zero diversions.

25 Q Yes, sir. Do you know why the model was -- do

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1 you know why that assumption was reached by applicants'  
2 traffic evaluators?

3 A (WITNESS NELSON) I was not party to their  
4 discussions of it, no.

5 Q Do you know why, Dr. Banner?

6 A (WITNESS BANNER) I don't know what decisions  
7 they made, but there was some confusion as to the Denver  
8 Rio Grande-SP joint solicitation agreement on this.

9 Q Okay. Well, would you -- isn't it true, Dr.  
10 Banner, that the CP conditions apply to traffic, most of  
11 the traffic, at any rate, flowing through both the Ogden  
12 and the East St. Louis gateways?

13 A (WITNESS BANNER) The conditions may apply,  
14 but in the post-diversion model, we are dealing with  
15 what is going to happen, and so far as we could  
16 determine, there was no assurance that the CP condition  
17 -- the joint solicitation agreement, would go past the  
18 merger. In fact, the statement was made that it would  
19 not be renewed at the time of the merger. Therefore, if  
20 that was the case, then we would assume that should have  
21 been in the model.

22 Q Yes, sir, but at this particular point of the  
23 analysis, the SP trackage rights acquisition analysis,  
24 an analysis trying to adjust the base case prior to the  
25 SPSF study, at that point the assumption was, was it

1 not, that the CP conditions would continue to apply and  
2 would affect the way shippers route traffic?

3 A (WITNESS NELSON) In actuality the data  
4 suggest that the SP did divert traffic to its own long  
5 haul from Ogden, so this is sort of --

6 Q That is a question that I have. Do you have a  
7 count of how many cars SP diverted from Ogden to its own  
8 long haul?

9 A (WITNESS NELSON) No, but the data in Table 2  
10 do suggest a growth in traffic without accounting for  
11 specific diversions.

12 Q That is your interpretation of what Table 2  
13 shows?

14 A (WITNESS NELSON) Yes.

15 Q What do you mean, Mr. Nelson, by the statement  
16 that the SP trackage rights did not find any diversions  
17 of East St. Louis gateway traffic?

18 A (WITNESS NELSON) Could you repeat the  
19 question?

20 Q What do you mean by the statement that the SP  
21 trackage rights study did not find any diversions of  
22 East St. Louis gateway traffic?

23 A (WITNESS BANNER) Can you point out where that  
24 is in the statement?

25 Q Lines 4 through 8 of Page 9. It could be that

1 I misunderstand what you are trying to say in that  
2 sentence. Perhaps you could just explain it.

3 A (WITNESS NELSON) One of the exclusion  
4 criteria in that iteration applied to that traffic, I  
5 believe.

6 Q To East St. Louis gateway traffic?

7 A (WITNESS NELSON) I believe we took the  
8 wording of this from the wording in your work papers.  
9 Our discussion relates primarily to Ogden.

10 Q Okay.

11 A (WITNESS NELSON) We have not analyzed East  
12 St. Louis.

13 Q Okay. Mr. Nelson, are there examples of  
14 Nevada or Utah transcontinental traffic that you think  
15 Rio Grande would lose as a result of the SPSF merger?

16 A (WITNESS NELSON) I leave judgments of that  
17 sort to Dr. Banner.

18 A (WITNESS BANNER) I think there was no  
19 diversion whatsoever of the Utah and Nevada traffic, and  
20 I think traffic that would be coming out of Reno would  
21 be subject to diversion to the SFPS.

22 Q Would you say that if it is coming from points  
23 east of Reno it is probably not going to be diverted to  
24 the SFSP?

25 A (WITNESS BANNER) I would not go so far as to



1 say that. I think that the SFSP would divert that  
2 traffic, particularly if there were no routes. I do not  
3 know the portion that would go if there were still a  
4 route.

5 Q Your primary assumption here for the theory  
6 that the traffic would be diverted is that the route is  
7 going to be closed at Ogden. Is that right?

8 A (WITNESS BANNER) The route would be closed,  
9 or the route would not be as serviceable in that the  
10 SPSF would control this traffic through the Southern  
11 Corridor.

12 Q Turning to Page 12, Point Number 3, Mr.  
13 Nelson, would you agree that the Rule 107 that you  
14 describe in Point 3 contains a number of exceptions?

15 A (WITNESS NELSON) I believe Point 3 addresses  
16 Rule 103.

17 Q Well, Rule 107 and Rule 108, but those rules  
18 contain exceptions, do they not?

19 A (WITNESS NELSON) There are exceptions to Rule  
20 107. In the documentation that we were provided there  
21 were not exceptions to Rule 108 that were comparable.  
22 And this discussion focuses on 108.

23 Q Are you familiar with the exceptions to Rule  
24 107?

25 A (WITNESS NELSON) I am familiar with the fact

1 that they take up two or three pages of single spaced  
2 type. I am familiar with them but couldn't list them  
3 off the top of my head.

4 Q Do those assumptions appear to you to be  
5 reasonable?

6 A (WITNESS NELSON) Again, you referred us to  
7 Page 12, and here we are talking about Rule 108, which  
8 does not have the exceptions, and not Rule 107.

9 Q Right, but did the exceptions to Rule 107  
10 appear to you to be reasonable exceptions?

11 A (WITNESS NELSON) The exceptions to Rule 107  
12 allowed the model to address the possibility of  
13 diversion. We present an example later of a case where  
14 the failure of a route to qualify for one of the  
15 exceptions caused that way bill to be a non-divert, and  
16 that was judged to be unreasonable, that there weren't  
17 enough exceptions to 107.

18 Q Isn't Rule 108, the way it was applied in the  
19 model, more liberal toward allowing diversions to occur  
20 than the rules that were used in the earlier iterations  
21 prior to the SPSF iteration?

22 A (WITNESS NELSON) The earlier rules appear to  
23 require that the diversion route use only the trackage  
24 of one of the two merging carriers for this  
25 non-diversion rule to be invoked, and by focusing only

1 on the end points, and ignoring whose track is used in  
2 between, Rule 108 appears to be more restrictive than  
3 the previous criteria.

4 Q Is it your testimony that you don't think  
5 there were any exceptions to Rule 108?

6 A (WITNESS NELSON) Not -- we rely on the  
7 documentation supplied in that particular case by  
8 witness Swain at the end of his cross examination, and  
9 also on the treatment of this traffic in the sample  
10 diversions in the work papers.

11 Q Mr. Nelson, is the example diversion on Page  
12 113, how is that diversion related to the SFSP merger?  
13 Or Dr. Banner.

14 A (WITNESS BANNER) Well, that indicates the --  
15 there is a zero diversion in that example.

16 Q Yes, sir. Well, my question is, couldn't  
17 Southern Pacific haul this traffic from Modesto to New  
18 Orleans today by the route that you suggest so that in  
19 fact the SFSP merger is not changing anything with  
20 regard to this particular movement?

21 A (WITNESS BANNER) Physically it is possible  
22 for them to have done that. We believe in the diversion  
23 model considering all the claims made for the SFSP that  
24 that should have been considered as a diversion route.  
25 It was not. It is a zero diversion, because of the

1 single merger carrier exclusion.

2 We consider that to be an incorrect -- or it  
3 would not be a rational decision from a traffic  
4 standpoint with regard to diversion considering the  
5 single line character of the route and the other claims  
6 made by SFSP of the advantages of this routing.

7 I would assume that given that they made  
8 assumptions about the new routing, that the model should  
9 conform to the assumptions they made. On the basis of  
10 those assumptions, I would have assumed that this was a  
11 diverted car.

12 Q Doesn't a traffic diversion study attempt to  
13 identify only diversions that are caused by the merger  
14 itself?

15 A (WITNESS BANNER) I would think that would be  
16 correct.

17 Q Well, what about this merger would  
18 specifically cause this diversion?

19 A (WITNESS BANNER) Going on this route, you do  
20 have an SFSP route, which is not the same as the SP  
21 route in the original movement.

22 Q So your theory is that, first of all, you  
23 think that the operating plan would indicate that this  
24 car would be handled by a route different from SP's  
25 route today. Is that right?

1 A (WITNESS BANNER) I didn't get that.

2 Q Are you saying that you think the operating  
3 plan would indicate this car would be handled by a route  
4 different than the route SP would use to take it from  
5 Modesto to New Orleans today?

6 A (WITNESS BANNER) I believe that to be in  
7 conformity with the assumptions of the operating plan.  
8 Yes, there would be a diversion.

9 Q But you are not aware of how the operating  
10 plan suggests the traffic from Modesto to New Orleans  
11 would be handled, are you?

12 A (WITNESS BANNER) I am suggesting that if I  
13 were looking at this as a traffic officer, and it was an  
14 expedited movement going over the combined routing, I  
15 certainly would say that would be one of the movements  
16 that I would seek to get to make certain that I got  
17 compensated for the investment I made in the new  
18 route.

19 Q If the shipper of this movement were concerned  
20 about expedited service, why wouldn't he take the Rio  
21 Grande out of the route today?

22 A (WITNESS BANNER) Because perhaps now it is a  
23 service route.

24 Q Mr. Nelson, referring to the example on Page  
25 16, how many other movements are there that this example

1 illustrates?

2 A (WITNESS NELSON) Well, this is an example of  
3 Rule 107 causing a non-diversion because it doesn't  
4 qualify for one of the exceptions, and I believe Rule  
5 107 was the second largest cause of non-diversions after  
6 108. It was large, I would say over 10,000 way bills.  
7 I don't remember the number precisely.

8 Q Yes, but that was affected by Rule 107. I  
9 wanted to know if you know how many other movements are  
10 there like this movement on Page 16.

11 A (WITNESS NELSON) You mean from Modesto to  
12 Memphis, or that were affected by 107 because they were  
13 not covered by the exceptions?

14 Q That were affected by Rule 107 in the way this  
15 movement was affected by Rule 107.

16 A (WITNESS NELSON) Well, I'd say there were a  
17 large number of way bills that were caused to be  
18 non-divert because they didn't qualify for the  
19 exceptions to Rule 107.

20 Q What is there about the merger that is going  
21 to cause this movement to divert? Couldn't SP take it  
22 from Modesto to Memphis today on its own single line  
23 route, Dr. Banner?

24 A (WITNESS BANNER) This is a TOFC move. It is  
25 an expedited move. And there is, I think, in conformity

1 with the stated objectives of the merger of the SFSP. I  
2 would have considered that this could be a single  
3 carrier move, particularly controlled by the SFSP, and I  
4 would consider that as a good candidate for diversion.

5 Q Why isn't it a single carrier move today? Is  
6 it because the UP and Rio Grande are cooperating so  
7 closely on the Salt Lake City route?

8 A (WITNESS BANNER) I don't know why it is not  
9 moving today. It could be for a number of reasons,  
10 including that this is now a serviceable route, a  
11 service route, the shipper prefers it, and he may not  
12 have it available.

13 Q Why would the merger cause the shipper to lose  
14 the UP-Rio Grande route? Is this back to your theory  
15 that the Santa Fe merger is going to cause the UP to  
16 close routes?

17 A (WITNESS BANNER) That is a good answer.

18 Q For you, perhaps. Okay. Turning to Table 5,  
19 Mr. Nelson, isn't the difference in the movement  
20 evaluation shown on Table 5 the fact that for the second  
21 movement SPSF supplied the special equipment, and for  
22 the first movement Rio Grande supplied the special  
23 equipment?

24 A (WITNESS NELSON) Yes, I believe we state at  
25 the top of Page 17 that that is the apparent difference

1 or the apparent reason for the model's different  
2 treatment of the two moves.

3 Q Doesn't special equipment influence shipper  
4 routing decisions?

5 A (WITNESS BANNER) Yes, it does, but only when  
6 special equipment is difficult to get and considering  
7 the claim that the merged carriers will have so much  
8 more equipment available if they are willing to put the  
9 cars into this routing, they probably should be able to  
10 count on getting an increased proportion of that  
11 traffic, and I would have diverted more traffic.

12 Q Wouldn't you expect Rio Grande to almost  
13 always get Central Corridor routings on movements  
14 originating in California where it supplies the special  
15 equipment to the shipper?

16 A (WITNESS BANNER) There are a few assumptions  
17 involved there. First there is a route; secondly, that  
18 they have been asked to supply the car; thirdly, that  
19 the SPSF has not offered to supply the car. If I were a  
20 traffic officer for the SFSP, I certainly would be  
21 willing to supply the car in this case in order to get  
22 that traffic.

23 Q Don't you think that SP and probably Santa Fe  
24 are trying to offer to supply the car today?

25 A (WITNESS BANNER) Perhaps they are.



1 Q If this remained a Rio Grande specialty  
2 equipment car, how often do you think a shipper would  
3 route a Rio Grande specially equipped car away from Rio  
4 Grande and over to SPSF's single system?

5 A (WITNESS BANNER) It would depend on the  
6 service. Even with the Denver Rio Grande car being  
7 supplied, if the service deteriorated, then I would  
8 suggest the Denver Rio Grande to use their car  
9 elsewhere. I would prefer the car supplied by the  
10 carrier that provides the better service.

11 Q Okay, so the basic reason why you disagree  
12 with this movement is that you think the SPSF system  
13 will substitute its special equipment for Rio Grande  
14 special equipment throughout California and Oregon. Is  
15 that right?

16 A (WITNESS BANNER) They have the opportunity to  
17 do so, and particularly if the routing deteriorates. If  
18 the route itself deteriorates, then I think that the  
19 SPSF in considering the volume of traffic involved  
20 should consider that there is a higher probability of  
21 diversion.

22 MR. WILSON: Those are all the questions I  
23 have. Thank you.

24 JUDGE HOPKINS: Any redirect?

25 MR. VON SALZEN: No redirect, Your Honor. I

1 move the admission of the joint verified statement of  
2 Dr. Banner and Mr. Nelson.

3 JUDGE HOPKINS: Any objection?

4 MR. WILSON: No objection.

5 JUDGE HOPKINS: It will be received in  
6 evidence.

7 You kept your word, Mr. Wilson.

8 MR. WILSON: I try my best.

9 JUDGE HOPKINS: There is no sense in going  
10 forward now. Mr. Moates? Off the record.

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

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

14 MR. MOATES: Your Honor, we have been in  
15 contact with counsel for Kansas City Southern, and after  
16 reaching a stipulation with Mr. Raker, applicants have  
17 agreed to waive KCS witness Rowland. Mr. Rowland's  
18 statement appears in KCS Volume 8.

19 I would ask if we could at this time have this  
20 marked and received as a counsel's exhibit. For the  
21 record, this is an exhibit consisting of four quarterly  
22 financial reports with letters to stockholders of Kansas  
23 City Southern Industries.

24 JUDGE HOPKINS: Your last one was 126, as I  
25 remember. If there is no objection to this then --

1 MR. MOATES: Your Honor, I would like to state  
2 that Mr. Baker agreed simply that if Mr. Rowland were  
3 called to testify, he would authenticate these documents  
4 and verify that the signature, Landon H. Rowland, that  
5 appears on the quarterly reports for the third quarter  
6 -- the fourth quarter, rather, of 1983 and the third  
7 quarter of 1984 is his signature.

8 JUDGE HOPKINS: This will be received in  
9 evidence as SFSP-C-127.

10 (The document referred to  
11 was marked for  
12 identification as Exhibit  
13 Number SFSP-C-12.7)

14 JUDGE HOPKINS: Now, whose testimony is -- is  
15 anyone going to move that? There is no objection to his  
16 testimony.

17 MR. MOATES: Let's just say there is no  
18 objection.

19 JUDGE HOPKINS: Hearing no objection, it will  
20 be received in evidence.

21 We will be in recess until 9:00 o'clock  
22 tomorrow morning.

23 (Whereupon, at 4:55 p.m., the hearing was  
24 recessed, to reconvene at 9:00 a.m. of the following  
25 day.)