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Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 36873, *Union Pacific Corp. – Control – Norfolk Southern Corp.*

Dear Chief of Case Administration:

I write on behalf of Canadian Pacific Railway Company, on behalf of itself and its U.S. rail carrier subsidiaries (collectively, "CPKC"),[1] to present for the Board's consideration CPKC's assessment of the implications for this proceeding of conduct by Union Pacific Railroad Company and its Chief Executive Officer that has undermined the integrity of this proceeding.

In CPKC's view, the Board is at an unprecedented crossroads arising from UP's conduct in this proceeding. In a speech to approximately 900 rail shippers at the Southwest Association of Rail Shippers ("SWARS") 2026 annual meeting, Union Pacific's CEO, Jim Vena, "made remarks . . . threatening to retaliate against stakeholders who" might have the temerity to voice opposition to the proposed merger with adverse commercial consequences.[2] His closing words to the assemblage: {[redacted]} UP_3217794 at 52:30-52:41 (Exhibit B hereto). Multiple shipper associations have told the Board that Mr. Vena's threat has chilled shipper participation in this proceeding.[3] Mr. Vena's threat is not an isolated event and did not happen in a vacuum.

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[1] CPKC's U.S. rail carrier subsidiaries include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company.

[2] Letter from U.S. Senator Tammy Baldwin to Chairman Patrick J. Fuchs, Vice Chairman Michelle A. Schultz and Members Karen J. Hedlund & Richard J. Kloster, Surface Transportation Board (July 16, 2026) (Exhibit H hereto).

[3] Letter to Board from Joint Shipper Associations (ACC-9/ACD-9/AFPM-9/NITL-6/TFI-9) (filed Oct. 13, 2026).

This proceeding calls upon the Board to make the most important decision in the history of U.S. railroading. In a matter of weeks, CPKC is poised to present extensive evidence showing why the proposed UP-NS combination would harm the public interest. At the same time, however, it is already clear that UP's own conduct during this proceeding has raised grave concerns about the integrity of the proceeding, and in particular whether rail customers large and small—among the most important groups of industry stakeholders whose views should be heard—have been discouraged from participating out of fear of retaliation by UP. To CPKC's knowledge, never in the history of this Board—or the ICC—has there been such a blatant effort by an applicant before the Board to pervert and contaminate the formal Board proceedings in such a manner that is beyond repair.

By deliberately compromising the "public participation from . . . affected shippers, carriers, . . . rail labor[,] and other interested parties" (49 C.F.R. § 1180.1(m)) that underpins the Board's assessment of the public interest, UP's misconduct has precluded "a *fully developed* record on the effects of a proposed railroad consolidation" (*id.* (emphasis added)), and thereby irreparably undermined the integrity of this proceeding. The imminent public release of the videotape of Mr. Vena's statement will show the public at large how UP has attempted to bully its way to merger approval and make plain the consequences for the rule of law were the Board to take no remedial action.

As established by nearly a century of relevant precedent, under these circumstances the Board has both the authority and the imperative to take decisive action to address UP's misconduct. As we explain, that authority gives the Board ample latitude to act upon UP's misconduct, both to remedy the distortive effect in this proceeding and to send an unequivocal message that such conduct will not be tolerated in any Board proceeding, ever. CPKC urges the Board to exercise its authority decisively by finding that this proceeding has been irretrievably tainted by UP's misconduct and terminating the proceeding without granting Applicants the control authority that they seek.

Factual Background.

Throughout this proceeding, both UP and NS have operated with an extraordinary sense of entitlement. Having decided that this merger serves their own private interests, UP and NS have shown a stunning lack of respect for the Board and its process and have not been shy about expressing derision for anyone who stands in their way.[4]

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[4] This proceeding is not the only one in which UP has shown contempt for Board processes. *See Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes*, Ex Parte No. 772 (STB served Apr. 17, 2024) ("[T]he Board cannot condone UP's repeated and extended failure to provide the Board with information in a timely and responsive manner when requested. Rarely has a rail carrier engaged in such delay and obfuscation in response to the Board's requests for information. . . . Going forward, the Board fully expects UP, like all other members of the industry, to responsibly, timely, and candidly comply with such Board requests for information and will not tolerate the type of conduct exhibited by UP in this docket.").

Applicants have required multiple attempts to complete their application. The Board rejected their December 19, 2025 application as incomplete. Decision No. 9, at 1-2 (STB served Jan. 16, 2026). Applicants filed a revised application on April 30, 2026, but even then the Board concluded that the information lacked sufficient clarity and detail. Although accepting that application as procedurally complete, the Board held proceedings in abeyance and required supplementation in 38 specified areas. Decision No. 21, slip op. at 17-19, 21-32 (STB served May 28, 2026). Board Member Kloster has noted that "in [his] view, the Applicants have approached this proceeding with an apparent strategy of 'letting the line out slowly.'" Decision No. 37, at 5 (STB served Sept. 18, 2026) (Kloster, concurring);[5] *see also* UP_0607355 ({{ }}.").[6]

This mentality infected the Application. Discovery in this proceeding has revealed that Applicants' diversion analysis and the Operating Plan {{ }}.[7] And during the drafting process, NS's Chief Strategy Officer {{ }} *See* NS_00329313.[8] Mr. Vena has suggested to investors that UP's public-interest obligation depends on the Board following his interpretation of the regulatory timetable,[9] and that Board Member Kloster, who

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5 "I would also note that, in my view, the Applicants have approached this proceeding with an apparent strategy of 'letting the line out slowly.' Opponents have suggested that it seems that the strategy is to offer conditions that provide minimal benefits on less significant matters, while waiting to gauge stakeholders' reaction before offering more meaningful conditions on important matters. But Applicants should come with their best case in the Application filed to justify the merger so that the Board can decide on its merits. The Board should not have to sift through vague language to try and figure out where any deficiencies may be in the Applicants' proposal and what potential conditions could mitigate any harm." *Id.*

6 UP_0607355 is a document produced by UP in discovery and is Exhibit C hereto.

7 { }." McLaughlin Tr. at 119:22-120:14 (excerpts are Exhibit D hereto); *see also* Welch Tr. at 244:7-14 {{ } (excerpts are Exhibit E hereto); Rynaski Tr. at 267:2-12 (excerpts are Exhibit F hereto).

8 NS_00329313 is a document produced by NS in discovery and is Exhibit A hereto.

9 NYSE 2026 European Investor Conference Tr. (June 16, 2026) ("Otherwise, Ken, then we don't have to follow the statute either that talks about public interest.") (excerpts are Exhibit I hereto).

expressed some concern about UP's approach to these proceedings, must have "used AI" to summarize the Application, rather than read it.[10]

Throughout this proceeding, both UP and NS have been keenly aware of the importance of stakeholder views to the Board's assessment of whether the public's interest would be served by concentrating about half of the nation's freight traffic in the hands of a colossal UP-NS. Mr. Vena gave an interview in which it was reported that he and UP's EVP, Marketing and Sales, Kenny Rocker, had already "spoken with 200 customers so far and have meetings scheduled next month with the railroad's top 100 customers."[11] Why? "I've got a lot of work to do to tell the story properly."[12]

Even assuming some of that "work" involved forthright discussion about the anticipated effects of the proposed transaction—discussion CPKC welcomes—it is at this point indisputable that UP's interactions with customers also included witness intimidation and threats of retaliation. Mr. Vena's March 2026 SWARS remarks make the point. During the course of an hour-long address to hundreds of shippers and short lines, he recounted first {[redacted]}

UP_3217794 at 35:15-35:55 (Exh. B). The moral of the story—fall in line or get punished—was unambiguously reinforced in his final remarks when he closed by telling shippers that [redacted] UP_3217794 at 52:24-52:41 (Exh. B). {[redacted]}[13]

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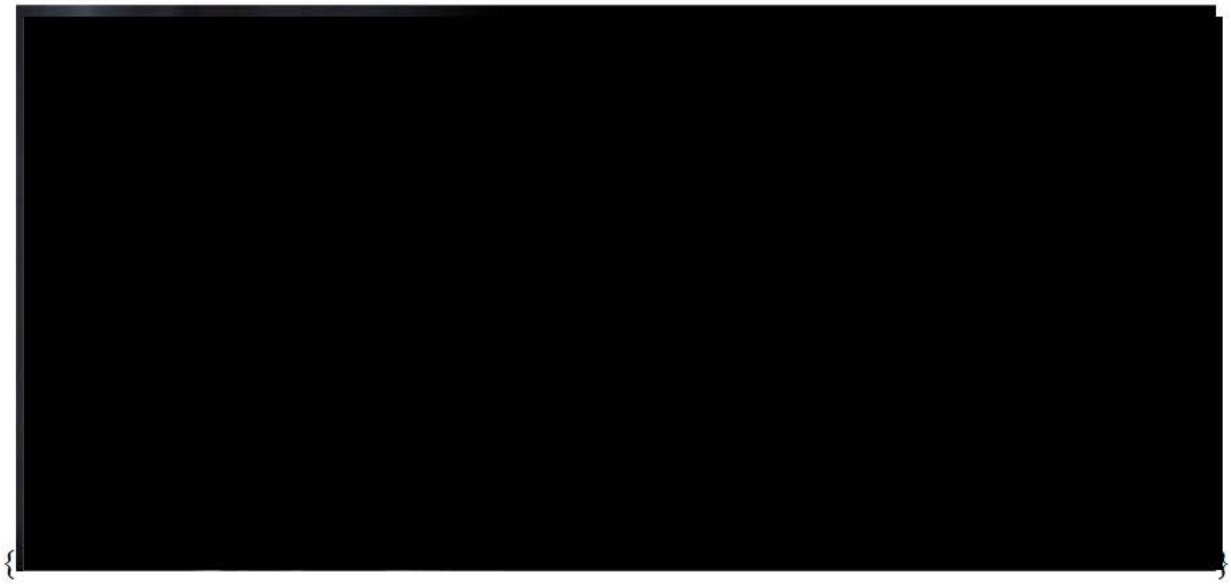
[10] Union Pacific Q3 2026 Earnings Call (Oct. 22, 2026) (Remarks of Mr. Vena) at 9-10 ("Listen, I always take people's position, and I read it, and I said to myself, 'I wonder if he [Member Kloster] used AI to summarize the 8,000 pages and all the detail or what,' but he is a smart guy, so he has the position, and we are clear, and we would love to have the ex parte discussion with the board to take them through what the benefits are.") (excerpts are Exhibit J hereto).

[11] Bill Stephens, *Inside the merger mind of Union Pacific CEO Jim Vena*, TrainsPRO (Aug. 14, 2025) (Exhibit K hereto).

[12] *Id.*

[13] In a similar vein of "teaching lessons," Mr. Vena has described how he would approach potential trackage rights arrangements entered into to address merger-related concerns: "guess what, we would just



Reports of the SWARS threats were disseminated widely, including through Congress[14] and the Board itself, but it was initially not clear—except to SWARS attendees who were in the room when Mr. Vena made his remarks—how seriously those remarks were delivered. To dispel any notion that Mr. Vena was not serious and did not disrespect UP's customers, at Mr. Vena's deposition he underscored that customers who oppose the proposed transaction are {{ }}[15]

Rather than apologizing, UP doubled down. In July 2026—before CPKC moved to compel production of the SWARS video—UP issued a flat denial: "Union Pacific did not threaten anyone."[16] A UP spokesperson brushed off Mr. Vena's SWARS remarks, saying they had been "taken out of context" by third parties intent on supporting a "narrative."[17] Kenny Rocker, UP's EVP, Marketing & Sales, jumped in to publicly accuse CPKC and BNSF of being

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reset the price higher for us, okay?" Union Pacific, Morgan Stanley Conference Presentation (Sept. 16, 2026) at 11 (Remarks of Mr. Vena) ("But on top of that, this is what it would do. If you allow—if we allowed x railroad to run on our railroad for 800 miles, we would charge them a per car mile charge that actually would make it more expensive for them to get to that destination. I've thought about just [about agreeing] because, guess what, we would just reset the price higher for us. okay?") (excerpts are Exhibit U hereto).

14 Letter from U.S. Senator Tammy Baldwin to Chairman Patrick J. Fuchs, Vice Chairman Michelle A. Schultz and Members Karen J. Hedlund & Richard J. Kloster, Surface Transportation Board (July 16, 2026) (Exh. H).

15 Vena Tr. at 172:20-173:13 (excerpts are Exhibit G hereto).

16 David Lassen, *Senator renews claims that UP has threatened retaliation against merger opponents*, TrainsPRO (July 16, 2026) (Exhibit L hereto).

17 *Id.*

the retaliatory predators—allegations that were swiftly rejected as baseless by both CPKC and BNSF.[18]

UP's and NS's "work" has had its intended effect. Relatively few industry participants have been willing to participate directly in this proceeding or make public their true views about the proposed merger. Trade associations are an exception because they provide some degree of protection from direct, targeted retaliation. And they have been raising concerns about retaliation for months. Nancy O'Liddy, executive director of the National Industrial Transportation League (NITL), told ION Analytics that UP had threatened shippers against speaking to the STB or opposing the transaction: "if you don't agree with the merger, we will remember who you are."[19] In an STB filing, the Joint Shipper Associations said they "are concerned that remarks by Union Pacific's CEO at the Southwest Association of Rail Shippers 2026 Annual Meeting threatening retaliation against opposing shippers, and Union Pacific's subsequent conduct, serve to chill shipper voices."[20] Eric Byer, CEO of the Alliance for Chemical Distribution, publicly told Kenny Rocker, "You know why more companies don't come out and speak up against this proposed merger? It's because the fear of retaliation is real and small businesses won't speak up as they know it will be held against them. Your boss has been pretty clear that retaliation will ensue if companies oppose this merger. That is why they are 'quiet' customers. They are not supportive of this merger, but cannot put their business and livelihoods in jeopardy."[21]

Underscoring the deep disrespect for the Board's processes reflected in UP's conduct, both Mr. Vena and Mr. Rocker have publicly emphasized that they put little or no weight on the views of shipper associations, asserting that the only valid sign of shipper concern or opposition to the proposed UP-NS transaction would involve actual written submissions on the docket in

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[18] Kenny Rocker, *Let's Talk Facts: It Doesn't Surprise Me the Opposition is Nervous* (July 9, 2026), https://www.up-nstranscontinental.com/featured/lets-talk-facts-it-doesnt-surprise-me-the-opposition-is-nervous (Exhibit M hereto); William Vantuono, *UP's Rocker: 'Here's the Truth.' BNSF, CPKC: 'Baseless Falsehoods*,' Railway Age (July 14, 2026) (Exhibit N hereto); David Lassen, *CPKC, BNSF respond strongly to UP claim they have pressured customers over merger*, TrainsPRO (July 10, 2026) (Exhibit O hereto).

[19] Serafina Smith, *Shippers concerned Norfolk Southern/Union Pacific deal could lead to service degradation but fear retaliation* (Jan. 26, 2026), https://ionanalytics.com/insights/dealreporter/shippers-concerned-norfolk-southern-union-pacific-deal-could-lead-to-service-degradation-but-fear-retaliation/ (Exhibit P hereto).

[20] Letter to Board from Joint Shipper Associations (ACC-9/ACD-9/AFPM-9/NITL-6/TFI-9) (filed Oct. 13, 2026).

[21] Eric Byer, LinkedIn (Oct. 7, 2026), https://www.linkedin.com/posts/eric-byer-51444b14_silence-is-not-opposition-union-pacific-activity-7513576333076029440-CsXu (Exhibit Q hereto); *see also* Chris Jahn, Chet Thompson & Eric Byer, *Union Pacific Can't Monopolize the Debate Over Its Merger*, American Chemistry Council (Oct. 15, 2026) (Exhibit R hereto) ("A company seeking to control nearly half of all rail traffic in the U.S. is threatening to use its market power to punish any customers who oppose the deal.").

this proceeding from an actual shipper, not that shipper's association.[22] Indeed, the comments of Mr. Byer quoted above were made in direct response to Mr. Rocker's public comments asserting that "[a] customer who has stayed quiet, or who has taken a neutral position publicly, is not a customer who opposes this transaction—even if they belong to an association who has."[23] For his part, at his deposition in this proceeding, Mr. Vena [redacted]

[redacted][24]

The Kafkaesque quality of UP's position is startling. According to Mr. Vena and Mr. Rocker, the Board should listen only to formal submissions by actual shippers, but that is exactly the path Mr. Vena and UP have discouraged "actual shippers" from taking.

The Need for Consequences.

Given UP's demonstrated misconduct, the path forward calls for swift and sure remedial action by the Board. The Board has already recognized the peril to the public interest and the integrity of the Board's processes, warning parties to this proceeding of the consequences of conduct that might deter public participation:

> "The Board expects all parties to agency proceedings to refrain from statements or conduct that could deter public participation or potentially influence interested persons to provide information or views that do not reflect their own judgment. *The Board will not tolerate retaliation* and will ensure that its processes are fair, transparent, and open to all stakeholders."[25]

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[22] In public remarks, Mr. Vena has repeatedly indicated that he does not much care about the views of shipper associations. Union Pacific, Virtual Fireside Chat Hosted by Bernstein Research (Sept. 1, 2026) at 10 (Remarks of Mr. Vena) ("I have a problem dealing with associations, not that I don't think they are valid and they have a point of concern, but they don't always, always and Chuck Grassley wrote a pretty good article that talks about sometimes associations are not aligned completely with the people that they represent.") (excerpts are Exhibit S hereto); Union Pacific, Morgan Stanley Conference Presentation (Sept. 16, 2026) at 12 (Remarks of Mr. Vena) ("It's hard to communicate against associations. They don't pay anything. So it's pretty hard to have a proper discussion.") (Exh. U).

[23] Kenny Rocker, *Silence is Not Opposition* (Oct. 6, 2026), https://www.up-nstranscontinental.com/letters/rocker-customer-support/ (Exhibit T hereto).

[24] Vena Tr. at 305:20-306:9 (Exh. G).

[25] Decision No. 28 (STB served July 22, 2026), at 4 (emphasis added).

And the Board was right to do so. The content of Mr. Vena's remarks shows why neither current customers of UP nor future customers of UP-NS can have any confidence that they will not suffer commercially if they speak out. Current UP customers are already subject to UP's pricing whims, as Mr. Vena's statement shows. Even if they might be optimistic that if they spoke up about their concerns the Board would turn down the merger, they would remain vulnerable to punishment at UP's hands. Mr. Vena's remarks show that he knows that UP already has the power to take their rates up. And in the event the Board ended up approving the merger, all UP and NS customers would know that they would be at least equally and likely more vulnerable to a much larger and much more powerful UP-NS.[26]

The brazen character of UP's threats is revealing in other ways as well. The record already contains irrefutable evidence of an Applicant's CEO willing to invoke his railroad's power over customers while asking permission to acquire still more power. That alone gives the Board compelling reason to question how that power would be exercised after approval. And the command that customers should fall in line, rather than ask themselves whether the merger will help or hurt them or this country as a whole, bears directly on the credibility of Applicants' suggestion that the Board approve the merger subject to temporary oversight and a variety of conditions enforcing Applicants' voluntary commitments. Neither the protections Applicants propose, nor any the Board might devise, could provide meaningful assurance if the shippers who would need to invoke them would reasonably fear the consequences of doing so.

Nor would it alter the landscape were UP to suggest that Mr. Vena's remarks were "just a joke." The Board can review the video of those remarks and draw its own conclusions about the veracity of any such claim. But even if those remarks somehow were viewed as a twisted attempt at humor, that would not overcome their impact on rail customers' perception of the risks associated with participating in this proceeding, since customers would act at their peril if they inaccurately guessed that Mr. Vena was only joking.[27] Comments about retaliatory price increases by a railroad seeking control authority are never acceptable—no matter how delivered.

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[26] As the public record shows, UP and Mr. Vena have worked hard to cultivate an air of inevitability to the Board's approval, in the hopes of freezing affected rail customers in place. As early as September 2025—before Applicants had even filed their merger application—Mr. Vena corrected an analyst who described the merger as "possibly approved": "It's approved." He then reiterated: "it's going to get approved." Union Pacific Corp., *Excerpts from Morgan Stanley 13th Annual Laguna Conference Transcript* (Form 425), at 9-10 (Sept. 10, 2025), https://investor.unionpacific.com/static-files/ff05f6de-27f2-4e30-bada-342dc963929d (excerpts are Exhibit V hereto).

[27] For precisely this reason, comments about having a "bomb" in an airport are illegal whether or not the person uttering them was joking. The FAA Administrator has emphasized, in affirming a fine for such conduct, that such remarks, even if intended as a joke, do not "occur in a vacuum," because anyone uttering them "should have known that [such] remarks were inappropriate and could cause alarm and disruption," because "[f]alse information about bombs can trigger alarm and disruptions." *In re Peter W. Stevens*, FAA Order No. 98-24 at 5-6 (Dec. 18, 1998) (Exhibit X hereto).

Legal Principles.

The Board's authority in this setting flows from two interrelated sources. *Firs*t, it is well settled that administrative agencies have "inherent authority to protect the integrity of the regulatory processes that they are charged with administering, and to prevent or remedy a misuse of those processes." *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning & Columbiana Counties, OH & Beaver County, PA*, 5 S.T.B. 283, 293-94 (STB served Oct. 4, 2000); s*ee also, e.g.*, *I.C.C.* v. *American Trucking Ass'ns*, 467 U.S. 354, 364-65 (1984); *Railroad Ventures, Inc.* v. *Surface Transp. Bd.*, 299 F.3d 523, 563-64 (6th Cir. 2002).

Second, Congress has charged the Board with assessing whether proposed transactions are "consistent with the public interest." 49 U.S.C. § 11324(c). The statutory language "does not restrict the factors" that the Board may consider in making that assessment. *Central Vermont Railway* v. *I.C.C.*, 711 F.2d 331, 335 (D.C. Cir. 1983) (Exhibit Y hereto). An unbroken line of precedent from this Board, the Interstate Commerce Commission, other agencies, and federal courts establishes that "the public interest" encompasses the integrity of an adjudicator's decisional process—and precludes conferring a public license or other benefit on a party that has (as here) sought to obtain it through dishonest or inequitable conduct.

Attempts to subvert the decisional process are so inherently egregious that they routinely result in the *retroactive rescission* of regulatory approval—a far more disruptive step than anything the Board would do here, where it has not yet issued a decision on the merits. In *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, for example, the Supreme Court vacated a patent that had been obtained through the introduction of false evidence. The Court explained that the integrity of governmental processes was of such paramount public importance that agencies have an *independent obligation* to police and punish misconduct:

> "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

322 U.S. 238, 246 (1944).

The Federal Communications Commission applied those same principles to strip a broadcasting license from an applicant that had sought to influence a Commissioner outside approved evidentiary channels. The D.C. Circuit upheld the FCC's action, focusing again on the harm to the public from rewarding inequitable conduct even if the grant of the underlying license might have brought some other public benefit:

> "Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding. . . . *No public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government*."

WKAT, Inc. v. *FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961) (emphasis added) (Exhibit Z hereto).

This Board's predecessor, the ICC, repeatedly invoked the same principles to unwind acquisitions by applicants who flouted the requisite approval process. In *Central of Georgia Railway Co. Control*, the Commission confronted an acquisition undertaken without ICC approval that nevertheless carried some public benefit. In rejecting the carrier's application for control authority, the Commission determined that the long-term harm to the public from rewarding those who disregarded the law easily overwhelmed any public benefits that might have resulted from a particular transaction:

> "The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law. If the Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. . . . If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated."

307 I.C.C. 39, 43–44 (1958) (Exhibit AA hereto). Four years later, the Supreme Court affirmed a similar ICC decision, relying again on the public interest in deterring inequitable and dishonest conduct in government decisional processes by sending a clear message that such misconduct would not be tolerated:

> "To approve a merger in the face of a § 5(4) violation[28] may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a fait accompli or avoid its jurisdiction altogether. . . . This additional interest in the proper administration of the statute places upon the applicant a heavier burden than may be the case for other regulatory violations, and mere lack of willfulness or alleged innocence need not suffice."

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[28] Section 5(4) was the Interstate Commerce Act predecessor of today's 49 U.S.C. § 11323, which provides that control of two rail carriers may be exercised "only with the approval and authorization of the Board."

Gilbertville Trucking Co. v. *United States*, 371 U.S. 115, 128-29 (1962).

Finally, the Board has addressed retaliation in the context of the "feeder line provision," explaining how fear of retaliation corrupts our nation's rail network:

> "[A]ffirmative statements by a shipper that it fears service-related retaliation for criticizing a carrier's rail service may be sufficient to show inadequacy of rail service as to that shipper. Adequate rail transportation involves more than just picking up or delivering a specific shipment in a timely manner on a given day. It entails rail service that is reliable over the long term so that shippers can prudently make contractual commitments that depend on future rail service for their fulfillment. Reliable rail service in this sense presupposes a business relationship that allows shippers to raise concerns about their service with the railroad (or with the Board) without fear of retribution by the carrier."

PYCO Industries, Inc. – Feeder Line Application – Lines of South Plains Switching Ltd., Finance Docket No. 34890 (STB served Aug. 31, 2007) at 12.

The Board and its predecessor agency have registered their deep displeasure with efforts to intimidate and retaliate against shippers in this and other contexts. *See, e.g.*, *Red Ball Motor Freight, Inc., Extension-California*, 128 M.C.C. 77, 81-82 (I.C.C. decided Aug. 5, 1977) (denouncing "efforts to dissuade" witnesses supporting the opposing party's application and warning that "[f]urther misdeeds" may lead to a finding of unfitness) (Exhibit BB hereto); Letter from Chairman Patrick J. Fuchs, Vice Chairman Michelle A. Schultz and Members Karen J. Hedlund & Richard J. Kloster, Surface Transportation Board, to U.S. Senator Tammy Baldwin (July 22, 2026) (stating that conduct intended to intimidate, retaliate, or otherwise discourage public participation "would be fundamentally inconsistent with the integrity of the Board's processes and its ability to carry out its statutory responsibilities") (Exhibit W hereto).

The Appropriate Remedy.

UP's deliberate effort to intimidate potential participants and thereby subvert the integrity of these proceedings calls for swift and sure consequences. This proceeding is uniquely important in the history of American railroading, and the manner in which it is conducted will likewise not go unnoticed. At the same time, the fact that the proceeding is one in which Applicants are seeking affirmative relief—an order allowing them to merge—provides the Board both with an extraordinary opportunity, and extraordinary latitude, to address the consequences of UP's misconduct.

The natural path forward would be to recognize that Applicants are seeking the most consequential "control approval" ever sought, and their conduct has disrespected and irretrievably corrupted the Board's process for reviewing that application, to such a great extent that the proceeding should not continue. UP's actions to discourage shippers from presenting their open and honest views on the public interest implications of the UP-NS transaction will prevent the Board from carrying out its statutory responsibility to conduct a full and fair

evaluation of whether Applicants have met their burden of establishing that their proposed merger in fact is consistent with the public interest. The Board should so find and take the next logical step of terminating this poisoned proceeding now. Doing so would both safeguard the integrity of the Board's processes, thereby avoiding injustice here, and also send a loud-and-clear message to all participants in Board proceedings that misconduct of this sort will not be rewarded with the relief applicants seek (approval of their merger) but instead will not be tolerated, as the Board has frequently said.

Several practical considerations would support a determination by the Board that the proceeding is already tainted by Applicants' conduct and should not continue.

First, there likely is no way to know how seriously the process has been corrupted, how many shippers have elected to stay on the sidelines or to swallow hard and accept a short-term contract offer from UP in exchange for silence or even support.

Second, even if the Board might—through extensive investigation using tools that attempted to persuade rail customers to come forward and speak frankly without fear of their identities being discovered—determine the full extent of the impact Applicants' conduct has had,[29] there would be no practical pathway for assuring those customers that they could come into the proceeding, identify themselves for Applicants to see, and present their public views without any potential for adverse commercial consequences. The cloud of potential adverse retaliatory commercial consequences would hang over their heads because, even if this Application is not approved, UP, in the words of Mr. Vena, [redacted]

Third, even if the Board managed to devise some creative solution, such that at some point in the future it could have confidence that interested shippers were no longer deterred from participating, the time for comments under the procedural schedule will expire long before any such confidence could be established.

At bottom, therefore, the one path that is both clear and fully effective in addressing UP's misconduct would be dismissal. The taint of this proceeding would be extinguished, and a clear message would be sent deterring any similar future efforts to corrupt other Board proceedings.

To be clear, CPKC is not seeking delay or denial on procedural grounds. CPKC stands ready to submit its comments on the schedule established by the Board, and those comments will provide the Board with many additional reasons to conclude that the UP-NS merger is not "consistent with the public interest." 49 U.S.C. § 11324(c). But as established by the foregoing

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[29] In exercising this inherent authority, government decisionmakers have a responsibility to investigate efforts to intimidate witnesses. *See, e.g.*, *David Ortiz Radio Corp.* v. *F.C.C.*, 941 F.2d 1253, 1260-62 (D.C. Cir. 1991) (holding arbitrary and capricious the F.C.C.'s failure to probe evidence alleging misrepresentations and harassment of opposing parties and remanding for further proceedings) (Exhibit CC hereto); *WMOZ, Inc.* v. *FCC*, 344 F.2d 197, 198 (D.C. Cir. 1965) (remanding to the F.C.C. to investigate allegations of misbehavior by "conspiratorial competitors") (Exhibit DD hereto).

precedents, UP's misconduct is a sufficient—and perhaps even mandatory—independent basis on which the Board should take swift remedial action.[30]

* * *

CPKC appreciates the Board's consideration of these observations and urges the Board to take decisive action to remedy the proceeding-poisoning impacts of UP's misconduct.

Respectfully submitted,

David L. Meyer
Attorney for CPKC

cc: Cassandra Quach
Joseph Matelis
All Parties of Record

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[30] *See Gilbertville Trucking*, 371 U.S. at 128-29; *Central of Georgia Control*, 307 I.C.C. at 43–44 (Exh. AA). Misconduct in the decisional process also precludes a finding of "present responsibility" to hold a federal license. *Wilkett* v. *I.C.C.*, 710 F.2d 861, 864 (D.C. Cir. 1983) (The present-responsibility inquiry takes into account "the nature and extent of violations, such mitigating circumstances as might exist, whether the [applicant]'s conduct represents a flagrant and persistent disregard for the provisions of the act, and whether sincere efforts have been made to correct past mistakes.") (Exhibit EE hereto). And in a similar vein, agencies can apply a presumption that evidence unhelpful to the intimidator would have been available but for the misconduct. *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW)* v. *N.L.R.B.*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) ("[T]he adverse inference rule plays a vital role in protecting the integrity of the administrative process[.]"); *Coats & Clark Sales Corp. – Petition for Declaratory Order – Certain Rates & Pracs. of Lee Way Holding Co.*, No. 40299, 1994 WL 61591, at *1 (I.C.C. Feb. 25, 1994) (drawing an adverse inference against respondent for its failure to comply with the Commission's discovery processes).

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October 2026, I caused a copy of the foregoing to be served by email or by first-class mail, postage prepaid, on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ *Kiera S. Judge*

Kiera S. Judge

EXHIBIT A

NS_00329313

Highly Confidential Attachment

Filed under seal pursuant to Protective Order

EXHIBIT B

[Slipsheet]: UP_3217794
Filed in Native Format

Confidential Attachment

Filed under seal pursuant to Protective Order

EXHIBIT C

UP_0607355

Highly Confidential Attachment

Filed under seal pursuant to Protective Order

EXHIBIT D

Excerpts of Dan McLaughlin's 9/30/2026 Deposition

Highly Confidential Attachment

Filed under seal pursuant to Protective Order

EXHIBIT E

Excerpts of David Welch's 7/29/2026 Deposition

Highly Confidential Attachment

Filed under seal pursuant to Protective Order

EXHIBIT F

Excerpts of Todd M. Rynaski's 9/9/2026 Deposition

Highly Confidential Attachment

Filed under seal pursuant to Protective Order

EXHIBIT G

Excerpts of Vincenzo James Vena's 10/20/2026 Deposition

Highly Confidential Attachment

Filed under seal pursuant to Protective Order

EXHIBIT H

Letter from U.S. Sen Tammy Baldwin to STB

TAMMY BALDWIN
WISCONSIN

United States Senate
WASHINGTON, DC 20510

COMMITTEES:
APPROPRIATIONS
COMMERCE
HEALTH, EDUCATION, LABOR, AND PENSIONS

July 16, 2026

The Honorable Patrick Fuchs
Chairman
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

The Honorable Michelle Schultz
Vice Chair
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

The Honorable Karen Hedlund
Member
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

The Honorable Richard Kloster
Member
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Dear Chair Fuchs, Vice Chair Schultz, Member Hedlund, and Member Kloster,

I write with concerns about the threat of potential retaliation by Union Pacific (UP) towards shippers and other rail stakeholders who choose not to publicly support the merger between UP and Norfolk Southern (NS). Threats of retaliation must be taken seriously, as they directly undermine the Surface Transportation Board's (STB or Board) review process and could prevent shippers from meaningfully participating in a forthcoming public comment period on the merger application. Given what is at stake with a rail merger of this magnitude, I ask that you address threats of retaliation and make clear retaliation by railroads will not be tolerated by the STB.

It has come to my attention that UP CEO Jim Vena has made remarks at conferences and closed-door meetings threatening to retaliate against stakeholders who oppose their merger application. This includes comments from Mr. Vena at the Southwest Association of Rail Shippers 2026 Annual Meeting in Houston in March, when he issued a thinly veiled threat to raise rates for customers who did not publicly support the merger.

The STB has acknowledged retaliation by railroads in the past, and now is the time to send a clear message to railroads and shippers that it will not be tolerated. In January 2025, former Chairman Robert Primus made a statement addressing the widespread issue of retaliation, whether it be in the form of rate increases, cutbacks in service, or refusals to provide new service upon request. In 2023, former Chairman Martin Oberman expressed frustration with the difficulty of getting shippers to comment on matters before the Board due to fears of retaliation. The freight rail industry has a long history of retaliation, and I can assure you that shippers nationwide are taking these comments at face value. I have heard from numerous stakeholders that they are afraid to publicly relay their concerns, knowing that UP can retaliate against them. Threats of retaliation discourage stakeholders from participating and undermine the STB's

ability to conduct a rigorous review of the proposed merger. The Board needs to hear directly from shipper companies to better understand the impacts of the merger UP is proposing.

I am deeply concerned by Mr. Vena's words and recent actions as his company attempts to see this merger process rubber stamped and approved with haste. Given the magnitude of this potential merger and the impact it would have on our nation's freight economy and the supply chain, it is simply unacceptable for UP to engage in this type of behavior. I urge the STB to address Mr. Vena's comments and take rail stakeholders' concerns seriously as you review the revised merger application.

Sincerely,

Tammy Baldwin
United States Senator

EXHIBIT I

Excerpts from NYSE European Investor Conference

Union Pacific Corporation (UNP)

NYSE: UNP · Real-Time Price · USD

299.60 +1.80 (0.60%)

Oct 29, 2026, 2:01 PM EDT - Market open

NYSE 2026 European Investor Conference Jun 16, 2026

Slides

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SUMMARY

Volumes are up 2% with strong operational performance and high service levels. The merger review is underway, targeting $3.5 billion in annual customer savings and significant synergies, while pricing remains above inflation and capital is allocated to debt reduction and modernization.

Ken Hoexter

Managing Director, Bank of America

Good afternoon, everybody. I'm Ken Hoexter, BofA's Airfreight & Surface Transportation and Shipping analyst. We're happy to moderate today's session with Union Pacific at the New York Stock Exchange's London Conference at BofA's London headquarters here. From the company, we have CEO Jim Vena, Chief Financial Officer Jennifer Hamann, also in attendance in the audience is Diana Proner from Investor Relations. I'm going to moderate today's session. With that, we have about 45 minutes, let's just jump in. Jim and Jen, let me turn it over to you. I know you have a few slides to get started with us here, then I'll jump in with some questions.

period from when we first announced the merger to making the revised application. Not a whole lot. We have continued to refine the analysis, and each time that we've done that, we basically come back to the same place. On the revenue side, you're talking about $1.8 billion net EBITDA synergies on the top line. That's that, again, that's those truckload conversions. That's also growth that we're seeing in the manifest auto world, some of the watershed traffic. That's on the top line. When you think about the cost piece, we're looking at about $1 billion of cost synergies.

That's really across the board. Certainly, it's being able to be more efficient with how we're doing our train handling. It's being more efficient from a purchasing standpoint. It's being more efficient from a back office standpoint. All of those things that bring costs into our network, we believe that we can go through and be more efficient. Technology will be a big enabler of that. You think about the capital that it will take us to unlock this. We said it's about $2 billion. About half of that is what I'll say is infrastructure capital. Think sightings, yard improvements, those types of things. The other half will be the technology that we'll need to do to be able to integrate our networks.

We also do think, though, that there's going to be about, I think it's $133 million of capital synergies that we'll be able to unlock through this. Those are all the net benefits that we expect to unlock from the transaction. In terms of where we think it's going to take us to take the debt back down after we make the payment for the Norfolk Southern, we still think it's going to be in year two. Towards the end of year two is when we believe we'll be able to have gotten our leverage back into a place where we're back in the market repurchasing shares. It's just shy of $12 billion of kind of annual free cash flow that we're going to be kicking off as we get through it. We've talked about this too in terms of a three-year implementation time period.

In the first three years, this is where we expect to get to by the end of year three.

Ken Hoexter

Managing Director, Bank of America

It's interesting because now we talked about the timeframe, and Jim, you were talking in your opening comments about the timeframe. I think we were talking on the side about that, given the abeyance, you still see this clock as starting based on this. Did you want to expand on that a little bit? Because I thought that was a really interesting comment.

Jim Vena

CEO, Union Pacific

Well, listen again, the statute's the statute. There's a statute for the STB that was given to them by Congress, and it's pretty clear. It says that once you accept, it's 12 months. That's what we would expect them to-

Ken Hoexter
Managing Director, Bank of America

Just once the application, which has been accepted officially.

Despite them saying we're putting an abeyance to collect more information Your view is that 12-month clock has now started based on that May 29th acceptance?

Jim Vena
CEO, Union Pacific

That's correct.

Ken Hoexter
Managing Director, Bank of America

Okay.

Jim Vena
CEO, Union Pacific

For them to gather all the evidence that they need to then take the time, and there's a specific amount of time for them to get the decision, and that's 90 days.

Ken Hoexter
Managing Director, Bank of America

It's after the 12 months?

Jim Vena
CEO, Union Pacific

Yes.

Ken Hoexter
Managing Director, Bank of America

That's a 15-month process. It can't be paused by this desire for an abeyance on their part.

Jim Vena
CEO, Union Pacific

Well, listen, I don't know. I follow the law, so if that's what the statute says, then that's what we're going to do.

Ken Hoexter
Managing Director, Bank of America

Jen, I just want.

Jim Vena
CEO, Union Pacific

Otherwise, Ken, then we don't have to follow the statute either that talks about public interest.

Ken Hoexter
Managing Director, Bank of America

Yeah.

Jim Vena
CEO, Union Pacific

If we have to do the things that are in the statute that we think that the STB wants.

Ken Hoexter
Managing Director, Bank of America

Yeah

Jim Vena
CEO, Union Pacific

I would expect the STB to follow the statute when it comes to the length of time.

Ken Hoexter
Managing Director, Bank of America

Okay. Thanks for that. Jen, you threw out the CapEx commitments. You did recently change some of the CapEx commitments. I think some of them were adjusted downward. A little tweaks?

Jennifer Hamann

EVP and CFO, Union Pacific

Just little tweaks.

Ken Hoexter

Managing Director, Bank of America

Was there anything that got changed? Was it sidings or just, hey, as you thought about the merger, what you're going to need?

Jim Vena

CEO, Union Pacific

I'll answer that.

Ken Hoexter

Managing Director, Bank of America

Yeah, go ahead.

Jim Vena

CEO, Union Pacific

Bottom line is people get all excited. We don't look at capital on an annual basis. You can tweak it up and down and you think if this is the way the business looks like, this is what we're going to do. It was a small tweak down, don't take that into it. We're going to have the capability, just like Union Pacific does today, that if we have to invest more in our railroad, capital for our plant or capital for growth, we'll do that. That's what we look at first. At the end of the day, we will never, ever stop investing in our railroad to keep it safe and operate it at a high level. That's not what we're going to do. We're investing in rebuild locomotives, modernization locomotives, and we'll continue to do that, Ken.

That was just a tweak as you go through and look at exactly what the flow of the business that we see, and I'm sure there's going to be a small change again as we get closer to the merger acceptance.

EXHIBIT J

Excerpts of UP Q3 2026 Earnings Call Transcript

Downloaded from StockAnalysis.com

Union Pacific Corporation -- Earnings Call Q3 2026

Oct 22, 2026

Operator

Thank you for accessing Union Pacific Corporation's 2026 third quarter earnings conference call held at 8:45 A.M. Eastern Time on October 22, 2026 in Omaha, Nebraska. This presentation and the accompanying materials include statements that contain estimates, projections, or expectations regarding the company's financial results and operations and future economic conditions. These statements are forward-looking statements as defined by the federal securities laws. Forward-looking statements are subject to risks and uncertainties that could cause actual performance or results to differ materially from those expressed in the statements. The materials accompanying this presentation include more detailed information regarding forward-looking information and these risks and uncertainties. In addition, please refer to the company's website and SEC filings for additional information about our risk factors.

Greetings, and welcome to Union Pacific's third quarter 2026 earnings call. At this time, all participants are in listen-only mode. A brief question-and-answer session will follow the formal presentation. If anyone today should require operator assistance during the conference, please press star zero from your telephone keypad. As a reminder, this conference is being recorded, and the slides for today's presentation are available on Union Pacific's website. It is now my pleasure to introduce your host, Mr. Jim Vena, Chief Executive Officer for Union Pacific. Thank you, Mr. Vena. You may begin.

Jim Vena

CEO, Union Pacific

Thanks, Rob. Sorry, I'm rather fast this morning. I'm ready to go. I overstepped you, so hopefully I don't do that to everybody today. No, I hope I am. We're ready to go here. So why don't we take a step back and think about where we are as a company and what we're doing. This morning, my wife, for whatever reason, got me up a little early. So I had a little more time to look at the railroad real close, and the first thing I look at is what's happening to the railroad weather-wise. Bottom line is, this is my favorite time of the year to railroad. Eric will tell you the same thing. Engineering programs are in a different place. The railroad is well set up. You don't have the extremes, too much of an extreme of weather.

It is a beautiful morning here in Omaha. Absolutely gorgeous. I'll tell you, it's a great place to live and a wonderful spot. The railroad's good. The range of temperature we have is from the low 30s to the high 80s, but that's who we are, and we have thousands of employees out there right now. Yesterday, we had 2.31 billion GTMs of product that we moved in this railroad, and all the people out there, and I got to congratulate them on the quarter that we had. Very excited to share with all of you who we are, what we're doing, and one thing we're not changing is the key pillars that we have. Safety for us is the foundation, and Eric will take you through some of the detail.

But where we are this year on an injury rate improvement from last year, where we are in the derailment rate, significant improvement from last year that continues all the work we've done, is very exciting as a foundation of everything that we do. And listen, safety for us is more than just a number. It's about people going home exactly the same way as they showed up when they came to work, and it's the movement of the goods that we have for America. We are moving products across the Western states and pretty soon across the entire country. That just helps the economy and helps businesses move ahead. So I love where we are safety, and I know Eric's got some more detail on that as we move ahead. And service, absolutely, I love where our service is.

Jim Vena

CEO, Union Pacific

I think you had 589 locomotives excess this morning.

Eric Gehringer

EVP of Operations, Union Pacific

That is correct.

Jim Vena

CEO, Union Pacific

289 stored, sitting there wondering what the heck you're going to do with them, and the other one's ready to go if we had bulk go up or ag or we had an issue. Ken, I like where we are. It's pretty exciting right now. Good question, though. I love it.

Ken Hoexter

Analyst, Bank of America

Appreciate it. Thank you.

Jim Vena

CEO, Union Pacific

Thank you.

Operator

The next question is from the line of Scott Group with Wolfe Research. Please proceed with your question.

Jim Vena

CEO, Union Pacific

Morning, Scott, how are you?

Scott Group

Analyst, Wolfe Research

Hey, thanks. Good morning. I echo those comments to Jennifer. Jim, do the comments from Costa change your view at all of deal approval, what you need to do to get deal approval? Then separately, Kenny, the yields ex fuel were flat, and I know there is mix, but I think there is an expectation that with better volume, rising trucking rates, that rail pricing is going to accelerate. Is that a reasonable expectation, and when do you think we start to see that? Thank you.

Jim Vena

CEO, Union Pacific

Yeah, listen. I think you were asking me about the one of the four STB members that put out the separate note after they accepted the application and moved it forward. Is that right? Is that what you were asking, Scott? Sorry.

Scott Group

Analyst, Wolfe Research

Correct, yes.

Jim Vena

CEO, Union Pacific

Okay. Bottom line is if you take a look at what's in the application, there is benefits across the board in far of how we enhance competition, how we enhance the product for our customers, how we are going to be able to make it less expensive. If we are faster, if we remove touch points, every customer that uses our railroad that used to have to hand it off to somebody else is going

to have a reduction in supply chain costs. It is automatic. It is basic business. We see that every day. We see that every day, even today, when we go hand off to a short line or hand off to somebody else versus the mileage and what we charge to be able to handle it on our own railroad. That is a given.

Listen, I always take people's position, and I read it, and I said to myself, "I wonder if he used AI to summarize the 8,000 pages and all the detail or what," but he is a smart guy, so he has the position, and we are clear, and we would love to have the ex parte discussion with the board to take them through what the benefits are. It is up to them if they want to have that or not, but we are clear on what our case is, Scott. It is a benefit for this country. I do not know how many times I have to say it, and I am not trying to say it to make sure people hear me, other than to say it is fact. Canada has two railroads that go across the entire nation.

There is a reason for that, and they are not split up, even though some of them do not like it. One of them does not like us to have the same thing here. At the end of the day, it is a benefit, and we are able to provide a better product to our customers, and that is what it is all about, and that is why this is going to be approved. I am 99.999% sure that it is going to be approved. Kenny, you want to take the second half? You ready to go?

Kenny Rocker

EVP of Marketing and Sales, Union Pacific

Yeah. First of all, we do not want to lose sight of the fact that we had a record revenue year ex fuel for Union Pacific, and we have done that in not just one area, in a couple of places that you heard in my comments. It is a dynamic market. When we are going out there to price every day, we are competing against barge, we are competing against sourcing options, we are competing against truck.

There is a lot of competition out there that we have to compete against. Eric and the team have provided us an excellent service product, and that is what we stand on. We are going to price to what the market can support. We want our customers to win. We want to win too, but we want our customers to go out there and win with the excellent service product that we have.

As the service product supports it, we're going to keep pricing to what the market can support.

Jim Vena

CEO, Union Pacific

Thank you very much, Scott.

Operator

Thank you. Our next question is from the line of Jason Seidl with TD Cowen. Please proceed with your question.

Jason Seidl

Analyst, TD Cowen

Hey, thank you, Op. Hey, good morning, Jim, and I'll jump on the train for saying congratulations to Jennifer, and thanks for putting up with guys like me for the past almost 25 years. I wanted to talk a little bit about now that we're in the merits phase and we're coming up along the comments period. Jim, can you talk to maybe some of the ongoing discussions to get more people on the side of supporting the mergers, whether they be customers or some of the unions that may not be supporting right now? Is this something that's ongoing, and could we expect some more letters of support, or is this something that we're just going to have to wait for the comments, and we're going to look forward from there?

EXHIBIT K

Bill Stephens, Inside the merger mind of Union Pacific CEO Jim Vena, TrainsPRO

Inside the merger mind of Union Pacific CEO Jim Vena

Inside the merger mind of Union Pacific CEO Jim Vena

By Bill Stephens | August 14, 2025

The UP chief touts the benefits of a transcontinental merger with Norfolk Southern

AC4400CW No. 6718, which UP classifies as a C44AC, leads an eastbound stack train at Glen Ellyn, Ill., on June 19, 2025. UP CEO Jim Vena says the railroad anticipated merger opposition from shippers, unions, and other railroads. David Lassen

OMAHA, Neb. — When Jim Vena walked into the Union Pacific Center for the first time as CEO two years ago today, he was toting a black, spiral bound notebook that he takes everywhere.

Among the entries jotted on the back pages — where he lists ideas, priorities, and possibilities — was a single word, written in all caps: MERGER.

“I’d been thinking about this from the first day I came back as CEO,” Vena says, holding up the notebook during an interview this week.

Planning an unprecedented transcontinental merger wasn't No. 1 on the list. Getting his safety, service, and operational excellence strategy rolling ranked ahead of scoring a deal with an Eastern railroad.

Vena says UP needed to show three things before crossing the merger bridge: That it could sustain service improvements and operate efficiently while maintaining a buffer of crews and locomotives to handle unanticipated events. "And the third thing is … 'Is this better for America?' That was one of the questions I asked myself," Vena says.

"Absolutely it's good," he says. "Gives more options, faster service, better for the economy, better for industry. And if we truly reindustrialize, we're going to be able to move those products in a much more efficient manner."

Union Pacific CEO Jim Vena sits in front of a desk that features heritage locomotives of predecessor railroads that UP has acquired over the decades. UP

Two other questions followed: Would an end-to-end transcon merger be good for UP's customers and employees? The answers were yes on both counts, Vena says.

UP is so confident that its proposed $85 billion acquisition of Norfolk Southern will generate growth that the railroad has promised to preserve all union jobs.

UP and NS estimate that their deal will produce more than $3 billion in merger-related revenue growth, which translates into 1.54 million additional loads annually by 2030, according to an analysis by Loop Capital Markets analyst Rick Paterson. That's 9.9% volume growth over and above what UP and NS would expect to achieve separately.

The Surface Transportation Board's tougher 2001 merger review rules have stymied a major Class I railroad merger. But Vena says the time is right for a coast-to-coast merger because trucking technology is advancing rapidly.

"You need to always look ahead. And sometimes I find people … still look backwards. You need to look backwards to learn from mistakes, and you think about what you need to do," Vena says. "But … if you stand still, you get left behind."

Vena sees autonomous trucks as a threat. Half of rail volume is intermodal business that could flow back to the highway if self-driving rigs become widespread and dramatically reduce trucking costs.

A merger, Vena contends, will improve the railroad's competitive position by giving UP the ability to offer seamless, nationwide service.

Initial opposition

Proposing a merger is one thing. Getting it across the finish line is quite another. And since the UP-NS deal was announced on July 29, opposition has already sprung up from shipper associations, some rail labor unions, other railroads, and some elected officials.

"We expected it," Vena says.

The National Transportation Industrial League says rail shippers won't back the merger unless it's accompanied by improvements in pricing, competition, and service. Trade groups for chemical producers, electric utilities, and agricultural shippers have said that prior megamergers have hurt service and competition while giving railroads too much leverage over their customers.

“Associations were going to come out against it. That’s normal,” Vena says. “I don’t deal with associations … I deal with our customers that pay us to move their products.”

Vena and Kenny Rocker, the railroad’s executive vice president of marketing and sales, have spoken with 200 customers so far and have meetings scheduled next month with the railroad’s top 100 customers.

Some customers back the merger, others are on the fence, and some oppose it, Vena says. The goal of the talks will be to go over the merger in detail and explain why it will benefit customers, he says.

The largest rail labor union, SMART-TD, skewered the merger proposal along with UP’s safety record, strategies, operations, and labor relations practices. The Brotherhood of Locomotive Engineers and Trainmen said it was premature to reach any conclusions, but said they would take every step to protect members.

Vena, who began his career in the union ranks as a brakeman for Canadian National, says the railroads will meet with rail labor leaders next month. “Sometimes the unions look at themselves, instead of looking at the employees that they represent,” Vena says.

“Our employees, both at Norfolk Southern and at Union Pacific, are very important to us,” Vena says. “And that’s why we guaranteed them a job through this whole process. If you have a job the day this deal gets approved, you have a job for life.”

The railroads also expected that some politicians, like Senate Minority Leader Charles Schumer, would speak out against the merger before learning the details.

“We’ll work through it here in the next couple of months,” Vena says. “ I’ve got a lot of work to do to tell the story properly.”

A Recipe for Trouble?

Norfolk Southern power leads a unit train of tank cars through River Grove, Ill., en route to Bensenville on the Metra-owned line used by Canadian Pacific (now CPKC) on Feb. 9, 2022. CPKC CEO Keith Creel has cautioned the UP-NS merger could bring a service meltdown. David Lassen

---

Canadian Pacific Kansas City CEO Keith Creel warned last month that the UP-NS combination posed the risk of a nationwide service meltdown. Past mergers — including CPKC’s and the 1999 Conrail split — were dogged by information technology glitches. Poor operating decisions following the UP-SP merger of 1996, meanwhile, created a massive rail traffic logjam in 1997-98.

Vena’s aware of the history.

“ I don’t want to be judged by what happened 30 years ago,” he says. “I want to be judged on what capability we have at Union Pacific now and how we’re operating and what kind of railroad and what kind of management team we have — and whether we’re smart enough to understand the perils that you get yourself into if you move too fast to consolidate a big, important company like Norfolk Southern into the UP family.”

UP and NS have pledged a smooth integration. Last year UP had a trouble-free cutover to its cloud-based NetControl computer system, which handles everything from rail car inventory and scheduling to waybill processing and train, locomotive, and terminal management.

Vena says he will stay on another five years to see the merger through. “I don’t want somebody else to wreck it for me,” he says.

On to the STB

UP and NS aim to move as quickly as possible through the merger review process. Although the railroads told the STB they would file their merger application on or before Jan. 29, 2026, Vena is pushing for the application to be completed within three months or so. That would mean the application could arrive as early as Oct. 29 — and start the review clock ticking.

Once the merger application is accepted, the board will take roughly 12 months to review the proposal. STB Chairman Patrick Fuchs has said that streamlining board processes and meeting deadlines are priorities.

“The STB, after we put the application in, has a year to gather information — a year! My God, the Romans built the Coliseum faster,” Vena jokes, noting the railroads will urge the STB to issue a decision within a year.

“And we’re going to push hard on that,” Vena says.

The STB’s 2001 merger review rules are untested. They require railroads to show that their merger will be in the public interest and enhance competition — not merely preserve it.

CPKC’s Creel argues that enhancing competition should mean that UP will have to open sole-served facilities to other railroads. UP and NS are expected to offer some sort of remedy for the nearly 20 customer locations that they jointly serve. But the railroads don’t believe Canadian-style interswitching is warranted because tying the UP and NS systems together will boost competition by offering shippers far more single-line service options.

Vena says the real competitor is the highway — not other railroads — and that UP will give shippers more options by building a bigger, better network. And much of UP’s rail-dependent traffic, like soybeans, competes in global markets. “If we price it wrong, we lose the business,” he says.

The competitive landscape has changed dramatically since the merger rules were drawn up to discourage further consolidation in the industry. In 2001, railroads were in growth mode. But traffic peaked in 2006 and railroads are losing share to trucks. UP and NS believe the STB will review their deal in the context of changing times.

“The people at the STB are smart,” Vena says. “They see the future, and they see that the future says railroads need to change … And if railroads don’t change, then they will continue to lose business.”

The 2001 rules also encourage railroads to forge commercial alliances rather than pursue mergers. The railroads say alliances may work in a specific lane — like the joint CN-UP-Ferromex Falcon Premium intermodal service — but that they cannot address hundreds of origin-destination pairs systemwide.

”Alliances don’t work,” Vena says.

‘Make Chicago work’

Today Union Pacific and Norfolk Southern exchange roughly a million carloads per year, or 6% of their combined volume. As each other’s largest interchange partners, they swap traffic at six gateways where their networks touch: Chicago, Kansas City, St. Louis, Memphis, Shreveport, La., and New Orleans.

As a single network, these gateways become seamless through routes rather than friction points, shaving as much as 48 hours off carload transit times. And that means that the merger, if approved, would funnel switching work and some through traffic out of Chicago.

But Vena says it’s unlikely that there will be massive swings of volume away from the Railroad Capital, a chronic chokepoint where 25% of North American rail traffic originates, terminates, or passes through. “I don’t see a wholesale change that we’re going to move everything out of Chicago and go straight to Kansas City,” Vena says.

Rather, he says the merger will smooth Chicago operations by simply turning it into just another crew change point. Chicago is a natural hub for east-west traffic because the shortest, fastest rail routes converge on the city.

It makes no sense to reroute traffic away from Chicago if it means more miles and additional time. “That’s a lot of money spent on fuel, crew costs, wear and tear on the rail, everything else, because you want to stay away from Chicago,” Vena says. “Make Chicago work.”

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EXHIBIT L

David Lassen, Senator renews claims that UP has threatened retaliation against merger opponents

Senator renews claims that UP has threatened retaliation against merger opponents

Senator renews claims that UP has threatened retaliation against merger opponents

By David Lassen | July 16, 2026

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Baldwin asks STB to address allegation; UP says it 'did not threaten anyone'

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WASHINGTON — U.S. Sen. Tammy Baldwin said today (Thursday, July 16) that she had sent a letter to federal regulators asking them to address her allegation that Union Pacific has threatened retaliation against customers who do not support the UP-Norfolk Southern merger.

"Given what is at stake with a rail merger of this magnitude, I ask that you address threats of retaliation and make clear retaliation by railroads will not be tolerated by the STB," Baldwin (D-Wis.) wrote in a letter to the four members of the Surface Transportation Board.

Baldwin had previously alleged threats of retaliation by UP during a June Senate confirmation hearing for board member Karen Hedlund; UP said at that time that "any allegation of retaliation is false." [See "STB's Hedlund calls competition ...," Trains.com, June 25, 2026].

The railroad responded quickly again today.

"It's disappointing that a comment was taken out of context and is being used to create a narrative that detracts from the real benefits of a single-line transcontinental railroad," UP said in a statement to *Trains*. "Union Pacific did not threaten anyone. We've heard from stakeholders across the board about real threats being made by our competitors who are afraid to compete."

Kenny Rocker, UP's executive vice president of marketing and sales, said in a message to customers earlier this month that customers had told him they faced "a real backlash" from BNSF and CPKC over support for the merger. Those railroads called those claims "baseless" and a "falsehood," respectively [see "CPKC, BNSF respond ...," July 10, 2026].

Baldwin's letter to board members says that UP CEO Jim Vena made remarks threatening retaliation at conferences and in closed-door meetings, citing specifically an appearance at the Southwest Association of Rail Shippers in March. "I urge the STB to address Mr. Vena's comments and take rail stakeholders' concerns seriously as you review the revised merger application," Baldwin wrote. Her full letter is available here.

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EXHIBIT M

Kenny Rocker, Let's Talk Fact: It Doesn't Surprise Me the Opposition is Nervous

Let's Talk Facts: It Doesn’t Surprise Me the Opposition is Nervous

Kenny Rocker, Executive Vice President-Marketing and Sales for Union Pacific | July 9, 2026

Kenny Rocker

Executive Vice President-
Marketing & Sales for Union
Pacific

To Our Customers:

Over the past several months, I've heard from many of you not just about what you're being told by those who stand to lose regarding our proposed combination with Norfolk Southern, but about the pressure you're facing for simply engaging in the conversation.

Every week I'm with customers whose networks span multiple Class I railroads and, despite seeing clear benefits at their Union Pacific-served facilities, are remaining silent on the merger due to concerns about retaliation elsewhere. Several have told me directly that after voicing early support, they faced real backlash from BNSF and CPKC railroads. This type of pressure is crossing the line. If you're experiencing something similar, we encourage you to share that with us and the STB directly. Transparency matters, and no customer should feel constrained when speaking about what is best for their business.

When you receive negative claims about this merger, it's worth asking two questions: who is telling me this, and, most importantly, what do they have to gain? Much of what's circulating right now is coming from competitors who stand to lose when we become faster, more competitive, and easier to do business with. That context matters. Let's have a real conversation about a couple negative comments the opposition is using.

The claim: "The STB's decision means the deal won't go through"
Let me give you a real example of how this gets planted. A competing railroad recently told one of our partners the deal won't be approved. Consider who benefits from planting that doubt. Railroads across the U.S. and Canada have come out vocally against the merger because they would have to compete, putting pressure on their margins.

Here's the truth. The STB accepted our application as complete, a meaningful

milestone toward a more competitive U.S. rail network. They've asked for additional detail in a few areas, and we welcome the chance to further strengthen the record. We've already submitted part of what they requested, and the rest will follow before the end of the month. This is the first transcontinental rail combination reviewed under the STB's current rules, and the most data-rich application they have evaluated. The STB's questions reflect diligence, not doubt. The STB has up to a 12-month statutory timeline to complete evidentiary proceedings once the application has been accepted, which sets the evidence period to close in May 2027. This requirement is an undisputed fact.

The claim: "This merger creates a monopoly"
This is one of the most misleading claims. Railroads carry only 27% of total ton miles in the U.S. freight market, and we compete every day with trucks, barges, ships, pipelines and air. That competition will continue after the merger. Even within rail, the combined network would carry roughly 39% of rail ton miles (2023 reviewed data), well below the figures the opposition likes to cite. That would make the combined entity the same size as BNSF, and no one has said the BNSF is too big to fail. Union Pacific's and Norfolk Southern's networks connect end to end, making this combination complementary, not overlapping. Claims of a 'monopoly' rely on selective statistics and don't hold up when you consider that this combination is built to take freight off the highway and strengthen competition, not limit your choices.

I am not asking you to take our word for it. I am asking you to stay engaged and have a conversation with us to understand what this means for your business. Every time I leave a customer meeting where the merger is discussed, customers have a clearer understanding and feel more encouraged by what they hear once the facts are on the table.

So let's talk. Reach out to me or your Union Pacific sales team and tell us what concerns you and excites you. Don't let anyone's scare tactics decide what's best for your business. That decision is yours, and I'm here to help you make it with the facts in hand. Let's go!!

Sincerely,

Kenny Rocker
Executive Vice President, Marketing & Sales

*Please review Union Pacific's **cautionary note** regarding forward-looking statements.*

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Take the Next Step

More than 2,000 businesses, unions, farmers and community leaders have already told the Surface Transportation Board why this combination matters. Tell Congress why America's first transcontinental railroad matters for American jobs, supply chains and economic growth.

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EXHIBIT N

William C. Vantuono, UP's Rocker: 'Here's the Truth.' BNSF, CPKC: 'Baseless Falsehoods,' Railway Age

July 14, 2026 | Class I

UP's Rocker: 'Here's the Truth.' BNSF, CPKC: 'Baseless Falsehoods'

Written by William C. Vantuono, Editor-in-Chief

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Union Pacific EVP Marketing and Sales Kenny Rocker

Union Pacific Executive Vice President Marketing and Sales Kenny Rocker recently sent a letter to customers, "Let's Talk Facts: It Doesn't Surprise Me the Opposition is Nervous," accusing certain opponents of the railroad's proposed acquisition of Norfolk Southern—namely, BNSF and CPKC—of threatening retaliation against "customers whose networks span multiple Class I railroads." BNSF and CPKC said Rocker's claims are "baseless" and "categorically untrue."

"Over the past several months, I've heard from many of you not just about what you're being told by those who stand to lose regarding our proposed combination with Norfolk Southern, but about the pressure you're facing for simply engaging in the conversation," Rocker wrote. "Every week I'm with customers whose networks span multiple Class I railroads and, despite seeing clear benefits at their Union Pacific-served facilities, are remaining silent on the merger due to concerns about retaliation elsewhere. Several have told me directly that after voicing early support, they faced real backlash from BNSF and CPKC. This type of pressure is crossing the line. If you're experiencing something similar, we encourage you to share that with us

and the STB directly. Transparency matters, and no customer should feel constrained when speaking about what is best for their business."

Rocker called merger opponents "competitors who stand to lose when we become faster, more competitive and easier to do business with … A competing railroad recently told one of our partners the deal won't be approved. Consider who benefits from planting that doubt. Railroads across the U.S. and Canada have come out vocally against the merger because they would have to compete, putting pressure on their margins. Here's the truth. The STB accepted our application as complete, a meaningful milestone toward a more competitive U.S. rail network. They've asked for additional detail in a few areas, and we welcome the chance to further strengthen the record. We've already submitted part of what they requested, and the rest will follow before the end of the month."

The proposed UP-NS combination is "the most data-rich application [STB has] evaluated," Rocker added. "The STB's questions reflect diligence, not doubt." He called opponent claims of UP and NS creating a monopoly "misleading," noting that railroads "carry only 27% of total ton-miles in the U.S. freight market, and we compete every day with trucks, barges, ships, pipelines and air. That competition will continue after the merger. Even within rail, the combined network would carry roughly 39% of rail ton-miles (2023 reviewed data), well below the figures the opposition likes to cite. That would make the combined entity the same size as BNSF, and no one has said BNSF is too big to fail."

"The allegation runs contrary to BNSF's culture and values," BNSF Vice President Corporate Relations Zak Anderson responded. "It's disappointing to see UP continue their baseless claims and rhetoric to distract from the central question before them—how consolidating 50% of all U.S. rail freight in one company enhances competition and doesn't raise affordability issues for rail customers and the American consumer."

"It's another UP falsehood, and any suggestion we are threatening our customers or any stakeholder is categorically untrue," said CPKC Assistant Vice President Communications and Media Relations Patrick Waldron. "Throughout this process, we have been very clear in our position. We have encouraged rail customers and all stakeholders to get involved and make their voices heard. As we have also repeatedly said, it is every stakeholder's individual choice. What is really happening? A wide range of stakeholders across the economy and country are learning the facts and standing up to voice their opposition to this combination that creates a behemoth of a railroad. We have also always maintained that this is not a done deal and that the Surface Transportation Board will conduct a thorough review, as we are already seeing."

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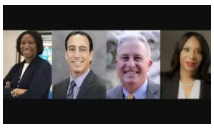

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EXHIBIT O

David Lassen, CPKC, BNSF respond strongly to UP claim they have pressured customers over merger

CPKC, BNSF respond strongly to UP claim they have pressured customers over merger

CPKC, BNSF respond strongly to UP claim they have pressured customers over merger

By David Lassen | July 10, 2026

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Rocker, UP EVP of marketing and sales, says shippers fear retaliation

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Kansas City Southern and Union Pacific locomotives lead a westbound CPKC freight at Brookfield, Wis., on July 9, 2026. David Lassen

A Union Pacific executive said this week in a message to shippers that customers have felt a “real backlash” from BNSF Railway and CPKC after indicating support for the UP-Norfolk Southern merger.

BNSF and CPKC issued strong responses today (July 10).

Kenny Rocker, UP executive vice president, marketing and sales, said in the message on the railroad's website that customers "are remaining silent on the merger due to concerns about retaliation elsewhere," then mentioned BNSF and CPKC. "This type of pressure is crossing the line," he said, urging any shipper with similar experiences to contact UP and the Surface Transportation Board.

CPKC responded by saying of Rocker's claim in a statement to *Trains*, "It's another UP falsehood and any suggestion we are threatening our customers or any stakeholder is categorically untrue.

"Throughout this process, we have been very clear in our position. We have encouraged rail customers and all stakeholders to get involved and make their voices heard. As we have also repeatedly said, including in commentary published in *Trains*, it is every stakeholder's individual choice. [CPKC CEO Keith Creel made that point in this *Trains* Turntable.] What is really happening? A wide range of stakeholders across the economy and country are learning the facts and standing up to voice their opposition to this combination that creates a behemoth of a railroad."

BNSF spokesman Zak Andersen was similarly to the point: "The allegation runs contrary to BNSF's culture and values," he said in an email to *Trains*. "It's disappointing to see UP continue their baseless claims and rhetoric to distract from the central question before them — how consolidating 50% of all U.S. rail freight in one company enhances competition and doesn't raise affordability issues for rail customers and the American consumer."

Rocker's comments come about two weeks after U.S. Sen. Tammy Baldwin (D-Wis.) said during a congressional hearing that customers had told her office that UP threatened retaliation for opposing the merger. UP said then that the allegation "is false, and we expect all parties to follow the law." [See "STB's Hedlund calls competition ...," Trains.com, June 25, 2026].

Rocker also wrote that a competing railroad told a customer the deal won't be approved. "Consider who benefits from planting that doubt," he said. "Railroads across the U.S. and Canada have come out vocally against the merger because they would have to compete, putting pressure on their margins."

CPKC responded to this, as well.

"We have also always maintained that this is not a done deal," the railroad said, citing prior statements by Creel, "and that the Surface Transportation Board will conduct a thorough review, as we are already seeing."

Rocker's message also said any claims the UP-NS merger would create a monopoly "rely on selective statistics and don't hold up when you consider that this combination is built to take freight off the highway and strengthen competition, not limit your choices." He said the combined company would carry roughly of 39% of rail ton-miles, "well below the figures the opposition likes to cite" and about the same as BNSF, based on 2023 data.

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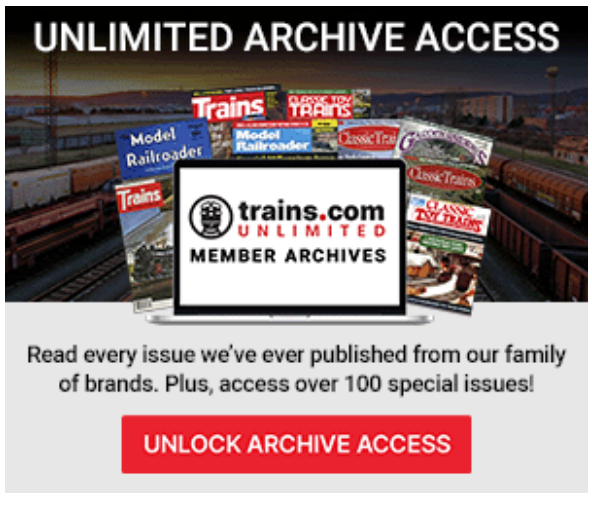

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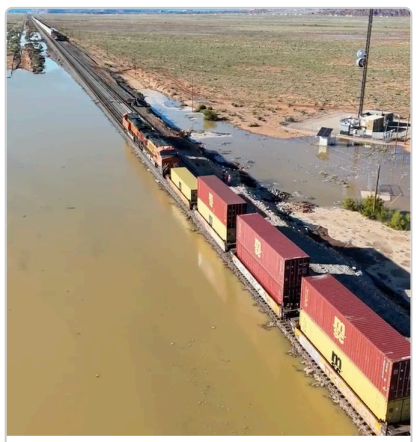

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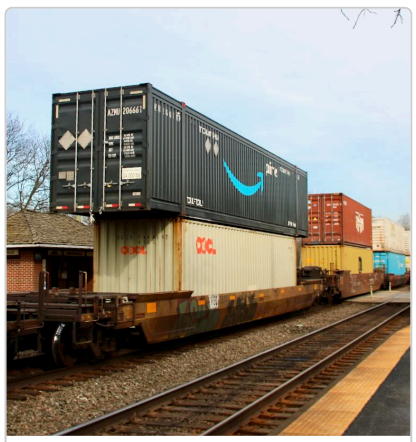

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EXHIBIT P

Serafina Smith, Shippers concerned NS/UP deal could lead to service degradation but fear retaliation

Shippers concerned Norfolk Southern/Union Pacific deal could lead to service degradation but fear retaliation

26th January 2026 11:00 AM

By Serafina Smith

Union Pacific's proposed acquisition of Norfolk Southern could lead to serious service degradation and failures for shippers who rely on them, according to trade associations.

These concerns persist as Union Pacific has threatened shippers not to speak to the Surface Transportation Board (STB) or file comments opposing the deal, said Nancy O'Liddy, executive director of the National Industrial Transportation League (NITL), a trade group representing shippers who rely on freight rail in a variety of industries.

"During this process, there have been threats by [Union Pacific]," O'Liddy said. The railroad has said "if you don't agree with the merger, we will remember who you are," she added.

Retaliation is a serious issue – and protection from it is one of the reasons that many shipping companies join associations like the NITL, O'Liddy explained.

“If you’re trying to run a business and your service is already poor, and you complain to the rail carrier or to the STB about that, the end result is your service will become nonexistent, even if that is illegal,” Corey said.

Concern over similar allegations led John Primus, the former Chairman of the STB during the Biden administration, to issue a statement in January 2025 warning about acts and threats of retaliation by railroads against shippers who speak out or complain to the STB.

Anne Reinke, president and CEO of the Intermodal Association of North America (IANA), said she had not heard of any retaliation fears. IANA represents motor carriers, ocean carriers, third party logistics providers and railroads – including Union Pacific and Norfolk Southern.

“Railroads are really big companies, but typically the shippers, their customers, are also really big companies. They’re both sophisticated business partners who can negotiate terms,” Reinke said. “Retaliation to me means that there’s a power imbalance, and nine times out of 10 there is not.”

“We are going to fight really hard that there are consequences for service failures,” O’Liddy said.

“Our stance on this merger is that, unless it can be proven that this merger will enhance rail to rail competition, it should be rejected. And right now, we have not seen anything that would enhance rail to rail competition,” said Scott Jensen, director of issue communications at the American Chemistry Council (ACC).

First transcontinental rail carrier

The merger of two of the nation’s largest freight railroads, announced on 29 July, would create the first transcontinental rail carrier to connect the Pacific to the Atlantic. The deal falls under the regulatory jurisdiction of

The Norfolk Southern/Union Pacific deal will be the first test of the STB's "new rules" for major mergers (between two Class I railroads), which were adopted in 2001.

The STB found that Union Pacific and Norfolk Southern's first merger application was incomplete on 16 January. The railroads have until 17 February to file a letter of intent describing plans to refile, and a new application must be submitted by 22 June. Union Pacific has guided to a close in early 2027.

Specifically, the STB found that Union Pacific and Norfolk Southern's impact analyses did not contain adequate market share projections. "I think it's going to take some time, because this time they are saying, we need real data," O'Liddy said.

The Department of Justice (DOJ) also filed a notice of intent to participate in the STB review in November.

"I think they're going to actually have a really hard time with the things that STB asked for," O'Liddy said. There is a USD 2.5m breakup fee to walk away from the deal, according to the merger agreement.

Consolidation concerns

A wave of railroad consolidation in the 1980s and 1990s resulted in the current market of six carriers, but 90% of the traffic goes through the largest four, Jensen said.

"What we saw from 2000 on was the railroads really figuring out how use the regulatory landscape and their market power to increase rates, to [add] other charges, and in some cases, even change their operations through things like precision scheduled railroading, where they trim back service," Jensen said.

The most recent merger, Canadian Pacific and Kansas City Southern, was finalized in April 2023, creating the railroad currently known as CPKC. That consolidation – between the sixth and seventh largest carriers at the time – created major problems, said Rob Benedict, VP of petrochemicals

By operating revenues, the Norfolk Southern/Union Pacific merger will be about seven times the size of the Kansas City Southern/Canadian Pacific deal, Benedict said.

"When they were implementing their operations together, AFPM Member companies noted the merged railroad was frequently missing shipments and delivering the wrong products. And when they reached out to the railroad, their calls went unanswered. This led to some members having to curtail production and left others on the brink of shutting down operations," Benedict said.

The merged Norfolk Southern -Union Pacific will capture around 43% of all rail traffic, said Jeffrey Sloan, senior director for regulatory affairs at the ACC. In the chemical industry, it will capture over 50%, he said. And around 40% of fuels and refined petrochemical products would rely on the merged carrier, according to Benedict.

While rail is a small percentage of the overall US freight market – around 5% is rail car traffic – industrial products like coal, grain, and sand as well as high risk chemicals tend to rely heavily on rail, said Reinke. Rail is generally safer to transport chemicals than trucks and is more efficient for bulk cargo, she said.

Many shippers represented by AFPM, NITL and ACC are known as "captive" – meaning they are served by one single railroad as it is.

Around three-quarters of ACC members are captive, Sloan said. "Even though [a] facility may already be served by a single railroad, lengthening that network and concentrating that market power can still have negative competitive harms," he said. For example, a captive shipper for part of the route may still have routing options later on – but a transcontinental rail carrier "will have every incentive to try to keep their traffic for as long of the haul as they can," he said.

Some AFMP shippers that used to be served five days a week have already seen service reduced to two or three

type of shipment, we need that shipment. And what we've seen more and more with the reduced competition, is those shipments aren't on time or correct when they do arrive. The inability to move certain materials in and out of our facilities, due to this poor service, will eventually overwhelm on-site storage capacity, leading to bottlenecks and eventual reduce utilization rates or in some cases forced production cuts," Benedict said.

Reciprocal switching

Reciprocal switching is one way to introduce some competition into a situation where there may be none, according to O'Liddy.

Where a shipper is captive to one rail carrier, reciprocal switching would provide a mechanism whereby that carrier would pick up the cargo and then "switch" it to a second carrier at a nearby interchange point, allowing the second carrier to offer a more competitive price. Reciprocal switching helps to put downward pressure on rates by giving shippers more options and more leverage.

"If they would allow some reciprocal switching at the end, then I think there would be a chance for shippers to be able to move their freight," O'Liddy said.

However, Union Pacific CEO Jim Vena has been "very clear" that the company does not want to "deal with" reciprocal switching, O'Liddy said. There were no provisions in Union Pacific and Norfolk Southern's application that addressed it, confirmed Sloan.

Under the current statutes – which came into effect when the railroads were deregulated in the 1980s – shippers must first file a complaint to the STB, and the onus is on them to prove that the rail carrier has exhibited anticompetitive behavior.

"The STB's rules set such a high bar, it's almost like you have to prove an antitrust case," said Sloan. "It has never once been granted to a shipper."

need for shippers to prove anticompetitive conduct by the rail carrier.

Reciprocal switching has been a hot topic of attempted rulemaking at the STB since at least 2016. In 2024 the agency adopted a final rule that would have created a pathway for carriers to apply for it, but it was overturned by an appeals court last year.

The railroads have been opposed. “Railroads pay for their own infrastructure. If they are letting another railroad onto their infrastructure and not actually making money off of that move, and letting them take over a customer, they’re at an economic disadvantage,” Reinke explained.

Other remedies that could ease the potential harm of the Norfolk Southern/Union Pacific deal include regulations to preserve access to competitive gateways (locations where cargo can be rerouted between carriers), trackage rights agreements, and commitments related to service performance, O’Liddy said. These agreements would have to be permanent to be effective, she said.

The STB oversight period is usually five years, said Sloan. However, merger conditions can and do extend beyond that period – for example, conditions associated with Union Pacific’s 1996 takeover of Southern Pacific are still in effect, he said.

A representative for STB declined to comment. Representatives for Union Pacific and Norfolk Southern did not respond to requests for comment.

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EXHIBIT Q

Eric Byer, LinkedIn

Eric Byer's Post

Eric Byer
3w

Hey Kenny Rocker, the premise of your letter yesterday to your customers is totally flawed. You know why more companies don't come out and speak up against this proposed merger? It's because the fear of retaliation is real and small businesses won't speak up as they know it will be held against them. Your boss has been pretty clear that retaliation will ensue if companies oppose this merger. That is why they are "quiet" customers. They are not supportive of this merger, but cannot put their business and livelihoods in jeopardy. Trade associations are here to represent companies for situations just like this. I am sure the folks at AAR will appreciate your support of trade associations though.

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Silence Is Not Opposition | Union Pacific
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EXHIBIT R

Union Pacific Can't Monopolize the Debate Over Its Merger

Union Pacific Can’t Monopolize the Debate Over Its Merger

Oct 15, 2026 Read time: 6 minutes Blog Post

RAIL MERGER

by Chris Jahn, Chet Thompson, Eric Byer

When it comes to its proposed merger with Norfolk Southern, Union Pacific seems increasingly intent on monopolizing not only the nation's freight rail system, but the debate over whether the deal is good for America.

UP executives have attacked trade associations for speaking out against the merger, arguing that because the railroad does not directly serve our organizations, we should not have a voice in the debate.

They have it backwards.

We don't serve Union Pacific. We serve our members. And our members, companies that manufacture essential products, employ Americans and depend on reliable freight rail service every day, have directed us to oppose this merger.

That's our job.

And recent rhetoric from Union Pacific leadership demonstrates exactly why companies need organizations like ours to speak on their behalf. UP CEO Jim Vena reportedly suggested at a rail shipper conference that customers who oppose the merger could see their rates go up.

Think about that for a moment. A company seeking to control nearly half of all rail traffic in the U.S. is threatening to use its market power to punish any customers who oppose the deal.

As **Eric Byer of the Alliance for Chemical Distribution** has put it:

“The fear of retaliation is real, and many customers cannot afford to risk their business relationships by speaking out against the merger. That’s why trade associations like ACD have a responsibility to represent their members’ interests and ensure their concerns are heard. No business should have to choose between protecting its livelihood and speaking up about a merger that could impact its future.”

The role of a trade association is particularly important when individual companies fear that speaking publicly could damage an important commercial relationship. Attempting to intimidate critics does not answer the serious questions surrounding this merger. It reinforces them.

Chris Jahn of the American Chemistry Council put it this way:

“Union Pacific may want to monopolize the debate on the airwaves, but we're focused on making sure President Trump, the STB, and the American voters know face-to-face this is a bad deal for America. The consequences of less competition, higher costs, and worsening service are going to impact not only our industry, but the American people who rely on our products."

It is not surprising that opposition extends well beyond our three associations. Manufacturers, farmers, energy producers, labor organizations, transportation groups, state officials and members of Congress have all raised concerns.

There are good reasons why. There is plenty not to like about the proposed merger.

First, decades of rail consolidation have already reduced competition and raised costs. Four major railroads control roughly 90 percent of U.S. freight rail traffic, while inflation-adjusted freight rail rates have increased 44 percent over the past two decades. This merger would concentrate even more power in even fewer hands.

Second, the proposed deal harms competition and fails to protect shippers. The merger would reduce transportation options across the combined network. But many of UP and NS's proposed concessions apply to only a narrow group of customers and eventually expire. Temporary promises are no substitute for permanent competition.

Third, history gives customers reason to be skeptical of those promises. Nearly 30 years after the UP-Southern Pacific merger, shippers are still fighting for competitive access promised as part of that deal. That merger also produced massive network

disruption. Customers have seen this movie before. They have little interest in a sequel.

Finally, customers shouldn't have to accept the risks of a massive merger to get better rail service. Many of the efficiencies UP and NS tout can be pursued through partnerships, better interchange and closer coordination between the railroads without eliminating an independent competitor.

As **Chet Thompson of American Fuel & Petrochemical Manufacturers** put it:

“America's refiners and petrochemical manufacturers need more rail competition, not less. As some of the biggest customers of Class 1 freight railroads in the country, our members have seen service decline and costs rise substantially as rail competition has eroded. Union Pacific can disagree with our position on their proposed merger, but making sure these concerns are heard is precisely our job. And the record makes it clear that this merger will harm competition and is not in the public interest. The stakes are too great to dismiss legitimate concerns of key rail shipper groups.”

The Surface Transportation Board's rules require a major rail merger to enhance competition and serve the public interest. That should be the test, not whether regulators can find enough conditions to make a bad deal slightly less harmful.

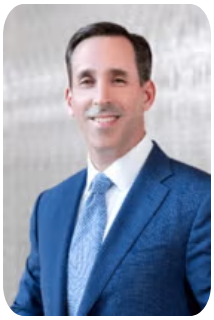
The fundamental question is simple: Does merging two railroads into one enhance competition?

Our members don’t believe it does. And this merger will have ramifications far beyond the railroad industry.

America is working to rebuild manufacturing, strengthen domestic supply chains and compete with China. Those goals require access to reliable and competitive freight rail service, not more consolidation.

Union Pacific can criticize trade associations. It can dismiss its critics. It can make new promises about what this merger might deliver.

What it cannot do is make the legitimate concerns of its customers disappear.



About the Author

Chris Jahn

As President and CEO of the American Chemistry Council (ACC), Chris Jahn is the leader of one of America's most essential, innovation driven industries and drives the national conversation on why chemical manufacturing strengthens U.S. manufacturing competitiveness. His leadership reflects a core belief: competitiveness is a choice, and American chemistry must be central to America's economic and industrial leadership. Chris has helped reframe the national conversation around the role of chemistry in strengthening U.S. manufacturing, energy security, supply chain resilience, and affordability for American families.

He has been named by *The Hill* as one of Washington, DC's "Top Lobbyists" and by the *Washingtonian* as one of DC's "Most Influential People" for representing the U.S. business of chemistry and its customers within the halls of Congress.

Prior to joining ACC, Chris served as President and CEO of The Fertilizer Institute, president of the National Association of Chemical Distributors, and president of the Contract Services Association. He began his career on Capitol Hill, including time as chief of staff to U.S. Senator Craig Thomas (R-WY).

American Chemistry Council

The American Chemistry Council's mission is to advocate for the people, policy, and products of chemistry that make the United States the global leader in innovation and manufacturing. To achieve this, we: Champion science-based policy solutions across all levels of government; Drive continuous performance improvement to protect employees and communities through Responsible Care®; Foster the development of sustainability practices throughout ACC member companies; and Communicate authentically with communities about challenges and solutions for a safer, healthier and more sustainable way of life. Our vision is a world made better by chemistry, where people live happier, healthier, and more prosperous lives, safely and sustainably—for generations to come.

EXHIBIT S

Vena Remarks from Virtual Fireside Chat Hosted by Bernstein Research

Virtual Fireside Chat Hosted By Bernstein Research

Company Participants

- Jennifer Hamann, Executive Vice President and Chief Financial Officer
- Jim Vena, Chief Executive Officer

Other Participants

- David Vernon, Analyst, Bernstein Research

Presentation

David Vernon {BIO 16688886 <GO>}

Good afternoon, everyone, and thank you for joining us. My name is David Vernon. I'm the Bernstein analyst covering Transports, Railways, Airlines, all things freight and passenger related. We are thrilled to be hosting Union Pacific today for a bit of a Fireside chat.

A little catch up on the state of the railroad and also talk to -- talk about the sort of next steps in the UP Norfolk Southern merger. Our CEO, Jim Vena; CFO, Jennifer Hamann are here joining us. They're going to kick us off with some prepared remarks.

To the extent that you want to have some questions, work them into the chat. You can do that either through the pigeonhole link that you should have -- had emailed to you when you're registered or you can try to hit me on Bloomberg and I'll try to keep track of kind of where we are so that we can get as much client input into the conversation as we can.

With that, thank you both for joining us. I'm going to hand it over to you and you can kick us off with some prepared remarks.

Jim Vena {BIO 7117749 <GO>}

Well, David, thank you very much, and great day here. I look outside and the weather is just perfect for September 1st for railroading anyways. That's the way I look at it. I don't really look at it on whether it's beach weather or holiday weather. It's how good is it for railroad and I like it. Just well perfect through the whole network. We're looking at a big storm coming up in the Gulf that might affect us a little bit, but overall, we're ready to go. So railroad is real good.

And of course, I have Jennifer Hamann here with me, Chief Financial Officer. And listen, I'm going to go through slides real quick and then open up for questions. So Jennifer is going to have a few comments right after me. So of course, a big long list of boilerplate got longer after the merger than it was before, but we'll be making some forward-looking statements. So if you have any questions, please refer to the UP website and SEC filings for additional information.

If we look at the first slide we have up, let's recap the past month or so since we talked at our earnings. In late July, we announced our agreements with Canadian National and provided the supplemental information the STB requested. A few weeks ago, on August

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Bloomberg

And really that's all that we've been following ever since we have become more efficient as a railroad and we've gone out and won new customers, brought them onto the railroad. And what's enabled us to win in those marketplaces is what Jim just described at the start, we've become more productive. We're able to go compete for more business. It opens up that aperture.

Q - David Vernon {BIO 16688886 <GO>}

Okay. And since we're on the reconciliation of customer value here, I'm going to just kind of jump forward a little bit. But when we think about the -- some of the arguments that were put forward by a number of the shippers' associations, right? These are the chemicals guys, the guys that are not really motally competitive in a lot of ways. One of the things that stood out to me in reading those filings without AI and with AI was with the idea that there's nothing really in it for them. They're taking a lot of risk because you're going to convert a bunch of highway traffic that maybe screws up their service.

If volumes are going to grow, how do you put forward some sort of compelling case that there's some actually benefits to more rail-centric shippers from your ability to convert more highway traffic, like how does this become a portfolio win for all the customers in the rail industry as opposed to a one-sided win for UPNS?

A - Jim Vena {BIO 7117749 <GO>}

Well, anytime you make a big change in the United States of America, whether it was when Alaska was purchased. There's all these naysayers that look at things, oh my God, what's going to happen? I don't think anybody would give Russia back and take today's $7 million that the US paid for it because there's some benefit there. It's the same with the Louisiana purchase. There was a lot of people that thought that there was no way and I could go to more recent, but let's jump to the railroad.

I have a problem dealing with associations, not that I don't think they are valid and they have a point of concern, but they don't always, always and Chuck Grassley wrote a pretty good article that talks about sometimes associations are not aligned completely with the people that they represent.

So I've always had that thought. This is not new for me. So I want to deal with the customers that pay the bill because there is nothing like sitting down with a customer, whether it's a grain customer in Nebraska or it's others and say -- and they want to move product to this location or a new location and we figure out how to price it, how to use the new network and make them more competitive to win.

That's where it is. And that's why I have a hard time with what -- it's not factual what they're saying. There is true benefits for the shippers and the consumers with a seamless railroad that goes further and longer. No. And in fact, one of our competitors sold that hard when they went through their own merger. It was all about how it was better and seamless than it was going to work. Now they don't agree anymore, but I don't know what happened there.

A - Jennifer Hamann {BIO 4767797 <GO>}

But the STB agreed when they approved that merger because they said right in the front summary that the merger will enhance rail competition through single line service.

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A - Jim Vena {BIO 7117749 <GO>}

Yeah. So we'll work through that. And remember, we do have 2,000 people that have written positive and 500 are customers. So we think that that's a pretty good show of people that see the benefits for themselves and be able to grow and have a better availability to move into different markets. And (Multiple Speakers).

Q - David Vernon {BIO 16688886 <GO>}

Is it somehow as simple as if you're growing the network and you're developing positive contribution from an additional set of traffic that your ability to accommodate more services for the rail-centric guys grows with that? I mean, I don't know, it would seem like if you guys are doing better in Intermodal, then maybe you don't have to be as aggressive on chemicals, like I don't know, like do you think about from a portfolio like that or no?

A - Jim Vena {BIO 7117749 <GO>}

Well, listen, we price today by what the market allows us to price. Any business should do that. You don't price on -- flip a coin and decide what it is. And there is a lot of protection for -- when it comes to pricing that's built into the -- all the regulations for railroads. So we won't have to get into that detail. David, you know about it. We're very regulated on that. But at the end of the day, what it comes down to is there's different products with different requirements. Some products need just in time. And some auto parts, you can't fool around with them.

So there's different pricing for different types of products and we don't want to change that. We think that there's some people that say, listen, it's very important for us. It's still cheaper than truck. We'll move the product by rail. And of course, the market allows us to price at a different point of view. The good part about the merger is we're going to be able to have more of that just in time capability because of the handoffs and everything else that happens.

So if you're moving -- if you're going to be moving auto parts and we move them into the facilities in the East or finished products West, we'll be able to handle them seamlessly without having the touch points and the delay that they have. So that's the way we look at it. Jennifer, anything to add?

A - Jennifer Hamann {BIO 4767797 <GO>}

Well, the only thing I'd add is -- and it's really more on sort of the top-line growth piece for the customer in terms of being able to open more markets for them. With us being able to offer faster single line service to a broader portfolio. I mean, just think about somebody who's in the middle of the country that today maybe they're on the UP lines, they tend to ship to the West Coast ports just because of interchanging to an East Coast railroad to go out through an East Coast port.

Some of those markets that would maybe be available to their goods in Europe, they're not able to go after efficiently because they don't have that service available. They'll have that available to them tomorrow and vice versa.

So that's the piece that I think is -- will be developed over time as we put the merger together. But I think that's an exciting opportunity for many of our customers.

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EXHIBIT T

Kenny Rocker, Silence is Not Opposition

Silence Is Not Opposition

Author: Kenny Rocker, Executive Vice President-Marketing and Sales for Union Pacific | October 6, 2026

To Our Customers,

There is no better way to take the pulse of the transportation industry than by meeting directly with you, **the customers we serve**. The perspectives we gain in those conversations go far beyond what we can learn from regulatory filings, surveys or trade press headlines. That is the exact reason I have spent more than 70% of my time on the road this year, meeting with more than 55 customers directly and mostly at their headquarters, not ours. Add in 20 conferences, association meetings and Union Pacific-hosted customer events, and that gives me an opportunity to do a lot of listening. My pace isn't slowing, because those conversations are the most reliable information we have about what this merger means for your business.

Here is the first thing these interactions have taught me. A customer who has stayed quiet, or who has taken a neutral position publicly, is not a customer who opposes this transaction – even if they belong to an association who has. Many of you have told us plainly that you are still evaluating, that you are waiting for answers or that you would rather not take a public position while the proceeding is active. Asking for a thorough review is a reasonable place to be. We do not read silence as opposition, and neither should anyone else.

Customers who have filed **public support** letters now represent more than 30% of Union Pacific's volume. That counts only those who have chosen to speak publicly, not the many others who are still weighing the merger quietly. But what stood out most about the letters filed with the Surface Transportation Board (STB) since August was what was in them. Customers of every size, across multiple industries, put specific, first-hand benefits on the record. Each found its own opportunity in the same combination.

- Take our fertilizer customer in Idaho. Their super phosphoric acid loads at roughly 220 degrees and begins to gel as it cools; once it does, it cannot be unloaded. The physics of their product determine how far east they can sell, and today the interchange sets that limit. As they told the STB, the interchange is not a cost line. It is a market access constraint.

- One of the country's largest bioethanol producers put it in market terms. Roughly 70% of the volume they originate with us comes from the Mississippi River watershed, where two-line service to the East is uncompetitive today. In their words, single-line service would enable them to "reach new customers, move rail

cars with less empty mileage and ultimately lower prices for end consumers while supporting rural economic growth."

- The largest PVC producer in the U.S. reiterated that the merger will open opportunities in the East while also improving safety. Rail is already one of the most secure ways to move hazardous materials, and eliminating interchanges takes handoffs out of the move entirely. They also told the Board they have heard our competitors' objections and disagree with them.

A refrigerated food customer. A lumber customer. An automotive customer. A salt customer. Diesel and jet fuel customers. Every one of these letters is public, and each one spells out what this combination means for that business. I encourage you to read them.

That is what a single association filing cannot capture. Trade associations do important work and we respect it. But an association files one position, and the members who disagree, or who simply have not finished evaluating, do not appear anywhere in that filing. We have heard from customers who are not opposed even where their association filed against us, and from others who backed a filing because they want a thorough review, not because they are opposed to this transaction.

I will keep saying this as long as it needs saying: a quiet customer is not an opposed customer, and an association filing is not a headcount. I bring this up for a simple reason. We have direct relationships with our customers, and our job is to help you win. Our trains are spotted at your facilities, not at the association's headquarters. We move plastic from the Chemical plant, not the American Chemistry Council (ACC). When it is time to plan your next expansion, we sit down with you directly. We do not stop to wonder what an association thinks about the merger.

So, I will keep listening. If you are still evaluating, tell me what you are weighing. If you have questions we have not answered, ask them. And if what you want is a thorough, fact-based review, we want that too, because we believe the facts are on our side.

Sincerely,

Kenny Rocker
Executive Vice President, Marketing & Sales

Next Read: ***More Than 500 Customers Back Union Pacific–Norfolk Southern Combination as a Catalyst for American Growth***

Please review Union Pacific's ***cautionary note*** *regarding forward-looking statements.*

A STRONGER, MORE CONNECTED AMERICA

Take the Next Step

More than 2,000 businesses, unions, farmers and community leaders have already told the Surface Transportation Board why this combination matters. Tell Congress why America's first transcontinental railroad matters for American jobs, supply chains and economic growth.

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EXHIBIT U

Union Pacific Corporation Company Conference Presentation

S&P Global
Market Intelligence

Union Pacific Corporation NYSE:UNP

Company Conference Presentation

Wednesday, September 16, 2026 5:15 PM GMT

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No. I think you covered off.

Ravi Shanker
Morgan Stanley, Research Division

But Jim, you guys have not been sitting still waiting for them. At the same time, you've offered a number of concessions already, and we obviously had an agreement with Canadian National -- can you just talk about the thought process there, kind of why you did that? And kind of what benefits do you think it will give you through the process?

Vincenzo James Vena
CEO & Director

Well listen, you can go study history, all you want all the way back on mergers and anything else. And you need to deal with concentration of railroad against customers. And that's what we had when the merger gets consummated, we would end up with 3 rail tracks between our 2 that we have today, plus we would take over the Norfolk Southern one. So we needed to do something with that. You can't have that. So either we make a deal with somebody -- and I give Canadian National and Tracy and the whole team there, a lot of credit. They could see the value of what they do. They're going to be able to move intermodal from Canada into there. If they want the Kansas City, and I think it's wonderful. It's competition.

And they might take a little business away from us. Now they better be good or we're going to try to keep it, right? But at the end of the day, I love that. And with that, we started talking about the terminal issues, whether it's the TRRA and the STB came back twice and ask us on the TRRA, even though we said, listen, we don't want to control it. And what people miss there's terminal railroads and cooperation agreements within terminals across the U.S. And they are all run with one thing when the railroads own them. It's a nonprofit. It's not there to make money it's there to switch a railcar for the cheapest price going. And that's how we manage it all of us.

But we fixed TRRA with this, and we fixed the Kansas City. So it's good for CN. It expands their reach -- so we have to fix that. If you look at our network now, it's a bolt-on -- so would I make a deal with another railroad? Absolutely. But it would have to be a win-win for Union Pacific and for them and that they could see what the befit is. The idea to give up tracks of your railroad for no reason at all, just goes against the fundamental principle of how our business should work.

But on top of that, this is what it would do. If you allow -- if we allowed x railroad to run on our railroad for 800 miles, we would charge them a per car mile charge that actually would make it more expensive for them to get to that destination. I've thought about just bought a green because, guess what, we would just reset the price higher for us. okay? That doesn't make a particle of sense of business. In businesses should be who can get the best in what the market allows you to do. So that's why I'm going to have a hard time making a deal with anybody else. But if it's there, One piece of the deal that's really interesting, Robbie, is we gave Canadian National access from Canada to Mexico through Memphis. Yes. Man, I can hardly wait. We win by them growing Canadian business to Mexico. Got to love the competition. We just added to Canada against the Canadian Pacific love it. I didn't get a phone call thanking me about that was a great deal for you, Jim. And bad for CN.

Ravi Shanker
Morgan Stanley, Research Division

We shall see how this plays out. Jim, can you give us the latest insight into the conversations you're having with various stakeholders here called you in support of the deal, folks have called you with concerns. Kind of what's the latest update on that?

Vincenzo James Vena
CEO & Director

So we have over 2,000 groups or individuals that are positive on the merger, letters of support. We have over 500 customers -- and just a couple of days ago, the governor from South Carolina, okay, sent a letter in. And we have letters continuing to come in. So the support is the -- and it's the most support that anybody has had on a merger. So we're very happy, and it's across state lines all over the place. And we have some detractors that have said that they put in. And -- and -- but at the end of the day, the positive is much stronger than the negative because they see the benefit of being able to operate through.

So we're continuing -- I wrote a letter to the top 50 customers, CEOs, myself and said, listen, if there's anything that you want to talk to me, but you don't understand. This is my personal phone number. This is me give me a call and a couple of them have. And we've actually had great conversations, and we'll probably get a couple of letters of support from them. And some of the rest of them, I haven't heard from them and that means they must support me. I got it, and it's not quite. But at the end of the day, communicate with our customers because that's really important.

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It's hard to communicate against associations. They don't pay anything. So it's pretty hard to have a proper discussion. And plus, I can't tell them exactly what we're doing with some of our customers because they're an association. So I like it. stakeholder, stakeholders, [indiscernible], I'm telling you. If there's 1 thing I really screwed up on. I did not know I was going to have to make so many trips to different government offices somewhere in this country over this, but I've done lots of myself, Jennifer and the entire team to make sure the story is straight. And they get it.

As soon as you tell them, how do you like an airline industry that never went across the country. And how do you like an interstate system where when 80 gets to the Mississippi River, you have to -- there's no bridge across. You have to barge it across the cars over to the other side, so you can get to the other part of the country. They get it as soon as you tell them that. So I love it. [indiscernible] communication.

Ravi Shanker
Morgan Stanley, Research Division

Any questions in the room?

Vincenzo James Vena
CEO & Director

Okay. I love it.

Ravi Shanker
Morgan Stanley, Research Division

Right up here.

Vincenzo James Vena
CEO & Director

There is a question. Okay. I thought I was going to get off the stage 2 minutes of 47 are...

Ravi Shanker
Morgan Stanley, Research Division

[indiscernible].

Unknown Analyst

Mine is actually on autonomous trucking. I was wondering what your view is it on it on it more broadly. Do you see it as a competitive risk or opportunity for railroads and as autonomous trucks increasingly become a reality -- and if it does come to pass, how can rails close the gap on the value offered to customers?

Ravi Shanker
Morgan Stanley, Research Division

It's been a big topic of the [indiscernible].

Vincenzo James Vena
CEO & Director

Listen, this is something that we should always think about in the business that we're in, and I do think about it lots. If you stand still, someone else is going to beat you. You've got to look at what's coming up and you've got to look forward, okay? We're not into defragmenting, okay, or fragmenting our railroad network to have 48 railroads like we had back in the second world war Class Is. We want to move ahead because our competitors are moving ahead -- and that is one of the reasons we've looked at this merger, and we think it's so important for the country is the competition is going to get better, and we need to be able to get better and have a chance to win.

I've actually written in an autonomous truck. And I'm telling you that technology is there on the road system. I do everything I can. I know for an old guy 68 years old, and people might say, by the time you get the 68-year-old grizzle then you only look at things in a certain way. If there's technology out there, I got my IT guy going to get me a flip phone from Apple because I want to see what that technology does plus I think it's cool. But at the end of the day, I write [Waymo] I write Teslas that are autonomous. I go trucks. I don't fool around Aurora. I've been in there a few years ago.

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EXHIBIT V

Excerpts from Morgan Stanley 13th Annual Laguna Conference Transcript

FILED BY UNION PACIFIC CORPORATION
PURSUANT TO RULE 425 UNDER THE SECURITIES ACT OF 1933
AND DEEMED FILED PURSUANT TO RULE 14a-12 AND RULE 14d-2(b)
UNDER THE SECURITIES EXCHANGE ACT OF 1934

SUBJECT COMPANY: NORFOLK SOUTHERN CORPORATION
COMMISSION FILE NO. 001-08339

The following are excerpts from the transcript of the Question and Answer presentation by V. James Vena (CEO of Union Pacific Corporation ("Union Pacific")) and Jennifer L. Hamann (Executive VP and CFO of Union Pacific), at the Morgan Stanley 13th Annual Laguna Conference held on September 10, 2025. A link to the replay of the webcast is available at: https://event.webcasts.com/viewer/event.jsp?ei=1732962&tp_key=cfcdf8d3eb.

The following excerpts contain only those portions of the transcript relating to discussions of the proposed acquisition of Norfolk Southern Corporation by Union Pacific.

Ravi Shanker
Morgan Stanley, Research Division

So let's just keep the rail team going, and very happy to have with us back at Laguna, Union Pacific with CEO, Jim Vena; and CFO, Jennifer Hamann. Jim and Jennifer, thanks so much for being here.

Before we start, I should say for retail disclosures, please see our latest research or go to morganstanley.com/researchdisclosures from Morgan Stanley's relationships.

And with that, Jim, I think you have a couple of slides to share with us. So do you want to walk us through that and then we can go into the Q&A.

...

V. James Vena
CEO & Director

Also, normally, I'd like to just speak freely, but there's a few things I want to make sure we cover off on everything that's going on at Union Pacific. So let me take you through that and spend a few minutes and then open up for questions, and we'll take any questions that we have. And I understand the relationship we have. I'd say, the involvement of Morgan Stanley. So I understand, but we have people out there that could ask questions.

So as a reminder, we will be making some forward-looking statements. These statements are subject to risks and uncertainties. So please refer to the UP website and SEC filings for additional information. We're going to start by making some brief comments.

See we add value here at the Laguna Conference. Any other questions?

Unknown Analyst

Why is now the right time for this deal? Why not 5 years ago, 10 years ago, given that the compatibility of the networks has not changed?

V. James Vena
CEO & Director

Right, well, that's a great question. And fundamentally, you need a great service for not just a short period of time, you needed to show people what's possible. And I think we've done that. So that was really important. You could see it from the numbers. So you have to have service at the right level. You have to have — you have to show the people you can operate a safer railroad so that you don't have an issue with safety because safety will cause you a problem too. So you put those 2 things in the right place. And you also need an administration and a regulatory that are systematic in how they look at things and are going to not do it on a personal view, but on the view of does this really help the country? Does this really help the customer? Is it beneficial for all those? And I think we have all that now. That's what it is.

Now it's never guaranteed. There's nothing guaranteed in life, okay? But we're very comfortable at Union Pacific that we did all the homework before to touch all the parties that we had to touch. We looked at our service level. We looked at the — how we're dealing with our unionized employees and making sure that we're in the right place. And we have 11 of the 12 unions either in a tentative agreement or already an agreement that has been passed by the members. And on that 12th one, we actually gave them a 3% wage increase starting September 1 because we'd like to take care of our employees. So that's why it's now and not 5 years ago. And 5 years ago, so if I go back — well, I guess it's a little longer than that. I was going to tell you, I was on my way to some mountaineering stuff, but I wasn't. I'm still here at Union Pacific. So thank you very much.

Ravi Shanker
Morgan Stanley, Research Division

Understood. Any other questions? Anyone else? A question over here.

Unknown Analyst

Just wondering if you guys can talk about your capital allocation strategy as you look out over the next couple of years in the meantime before the merger is possibly approved, what you're kind of prioritizing?

V. James Vena
CEO & Director

Okay. Would you say possibly approved. It's approved.

Jennifer L. Hamann
Executive VP & CFO

And she said 2 years, too.

V. James Vena
CEO & Director

I like that. There's 2 problems I have with your question. Overall, the premise is perfect, but the 2 years and the possible, it's going to get approved. And we'll get some concessions because it's a bolt-on deal. The nice part about this is not a lot of overlap other than St. Louis to Kansas City, which we'll deal with. So that's why we think it's a real positive. And 2 years, let's get serious. 2 years. My God, okay? But go ahead. Capital...

Jennifer L. Hamann
Executive VP & CFO

Capital allocation. So we aren't changing our priorities other than the fact that we have stopped our share repurchase program as we wait for the merger approval. But we're going to prioritize investing in the network as we do today. We will also be focused on maintaining a competitive dividend. We just announced the dividend increase, 3% here in July, and we've committed to looking at annual increases. So those 2 things will stay absolutely the same.

And then once we get through the merger, we believe that we're going to be able to quickly pay down the debt that we'll take on as part of it. We think we'll be able to pay that down in year 2 and resuming share repurchases in year 2. And then we'll get back to the mode that we have been in prior years of investing in the network, focused on safety and growth, innovation, steady dividend return to our shareholders and then using excess cash and our balance sheet, which will be very strong to buy back shares. Very powerful model.

V. James Vena
CEO & Director

Good question. Thank you very much.

Ravi Shanker
Morgan Stanley, Research Division

Maybe really quick in the 7 seconds we have left. Jim, you said that there's a lot of competition coming for you given the transaction.

Have you seen — in addition to the announcements made already, but have you seen competitors get more aggressive already to try and preempt something like this from a pricing standpoint?

V. James Vena
CEO & Director

EXHIBIT W

Reply to Sen. Baldwin

Surface Transportation Board
Washington, D.C. 20423-0001

July 22, 2026

The Honorable Tammy Baldwin
141 Hart Senate Office Building
Washington, DC 20510

Dear Senator Baldwin,

Thank you for your recent letter regarding your concerns about stakeholder participation in proceedings before the Surface Transportation Board (Board or STB). The Board takes very seriously allegations of potential retaliation or other conduct that could discourage participation in agency proceedings, including the proposed Union Pacific (UP)-Norfolk Southern (NS) merger. The Board is committed to ensuring that its proceedings remain open to meaningful participation by all interested persons, and it does not tolerate conduct intended to intimidate, retaliate, or otherwise discourage public participation. Such conduct would be fundamentally inconsistent with the integrity of the Board's processes and its ability to carry out its statutory responsibilities.

Accordingly, where an interested person believes that statements or conduct by another participant are intended to threaten and discourage participation in a Board proceeding, the person should promptly bring those concerns, along with any relevant facts or supporting information, to the agency's attention. The Board encourages stakeholders to contact the agency's Office of Public Assistance, Government Affairs, and Compliance (OPAGAC) regarding intimidation, retaliation, or other improper conduct. OPAGAC can receive such concerns on a confidential basis and/or facilitate their referral to the appropriate Board officials for consideration consistent with the Board's procedures and statutory responsibilities.[1]

The Board encourages all interested persons to participate in its proceedings. In the proposed UP-NS merger specifically, the proceeding already has more than 500 individual filers, including notices of intent to participate. As might be expected from a proceeding of this magnitude, the proposed UP-NS merger has among the highest number of parties in any proceeding since the Board's creation, and the deadline to file notices of intent to participate has not passed. Of the total, individual shippers represent the largest share of businesses that have filed to become party to the UP-NS merger proceeding. In addition, more than two dozen shipper organizations, collectively representing thousands of shippers across the network, have filed notices of intent to

[1] OPAGAC's Rail Customer and Public Assistance (RCPA) service frequently and effectively addresses shipper and other stakeholder concerns or complaints about railroad actions, oftentimes through direct engagement with relevant railroad personnel. Over the past four quarters, RCPA has worked to resolve about 100 railroad service, practice, rate, and other contentious matters, which typically arise independent of any Board proceeding.

participate, among other filings. The Board has also received notices of intent to participate from more than two dozen individual short line railroads and 11 labor unions.

Meaningful participation from a broad array of stakeholders strengthens the Board's decisions. Considering a wide range of perspectives facilitates informed decisions that further the Rail Transportation Policy that Congress set forth in 49 U.S.C. § 10101. The Board's proceedings are characterized by strong public participation, including shippers, carriers, labor, suppliers, state and local governments, intercity and commuter passenger rail interests, and other stakeholders, whose contributions inform Board decision-making.

Indeed, individual shippers and other stakeholders frequently make a significant impact on the Board's decisions. For example, the Board's hearing on demurrage, which involved contentious changes to railroad practices, generated testimony and other filings from nearly 40 individual shippers, providing specific details about service and commercial dynamics with individual carriers. Following that hearing, the Board took four actions to improve the applicable regulatory framework, with the Board frequently and directly citing shipper testimony to support its decisions.[2] From proceedings ranging from embargoes to competitive access to proposed transactions, testimony and other filings from individual firms and others have provided critical insights and valuable information.

The Board remains steadfast in its commitment to conduct all agency proceedings with fairness, transparency, and impartiality. We are aware of the reported statements by UP CEO Jim Vena. While any statements related to a particular proceeding will be addressed in the appropriate docket, the Board expects all participants in agency proceedings to refrain from statements or conduct that could deter public participation or potentially influence interested persons to provide information or views that do not reflect their own judgment.

Thank you again for sharing your concerns and for your continued interest in the Board's work. The Board is committed to carrying out the STB's statutory responsibilities in a manner that promotes confidence in the integrity of its proceedings. If you or your staff have any questions, please contact Ms. Janie Sheng, Director of the Board's Office of Public Assistance, Governmental Affairs, and Compliance, at 202-245-0238.

Sincerely,

Patrick J. Fuchs
Chairman

Michelle A. Schultz
Vice Chairman

Karen J. Hedlund
Member

Richard J. Kloster
Member

[2] See Policy Statement on Demurrage & Accessorial Rules & Charges, EP 757 (STB served Apr. 30, 2020); Demurrage Billing Requirements, EP 759 (STB served Apr. 30, 2020); Demurrage Billing Requirements, EP 759 (STB served Apr. 6, 2021); Exclusion of Demurrage Regulation from Certain Class Exemptions, EP 760 (STB served Feb. 28, 2020).

EXHIBIT X

In re Peter W. Stevens, FAA Order No. 98-24

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **PETER W. STEVENS**	FAA Order No. 98-24[1] Served: December 18, 1998 Docket No. CP97EA0025

DECISION AND ORDER[2]

Respondent Peter W. Stevens has appealed the written initial decision of Administrative Law Judge Burton S. Kolko finding that Stevens violated 49 U.S.C. § 46302[3] by joking about having a bomb in his baggage and assessing Stevens a $500

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[1] Portions of this order have been redacted for security reasons under 14 C.F.R. Part 191.

[2] The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 63 Fed. Reg. 57,729, 57,743 (October 29, 1998).

[3] This statute provides as follows:

> **§ 46302. False information**
> (a) CIVIL PENALTY. A person that, knowing the information to be false, gives, or causes to be given, under circumstances in which the information reasonably may be believed, false information about an alleged attempt being made or to be made to do an act that would violate section 46502(a) [aircraft piracy], 46504 [interfering with flight crewmembers and attendants], 46505 [carrying a weapon or explosive on an aircraft], or 46506 [other criminal offenses on aircraft] of this title, is liable to the United States Government for a civil penalty of not more than $10,000 for each violation.

civil penalty.[4] This decision denies Stevens's appeal and affirms the law judge's decision.

On October 23, 1996, Peter Stevens went to the Greater Buffalo International Airport to catch a flight for a business trip. (Tr. 107.) His wife at the time, Irene Stevens, drove him to the front of the terminal, stopped the car, and opened the trunk. (*Id.*) A skycap – that is, a person employed to carry hand luggage at an airport -- came over to help Stevens with his bags. Because one of the bags was unusually heavy, the skycap asked Stevens what it contained. (*Id.*) According to the skycap, Stevens replied, "A bomb." When the skycap said, "Excuse me, Sir?" Stevens said, "A hydrogen bomb." (Tr. 17, 31.) Stevens has disputed the skycap's account, claiming he only said it *felt like* a bomb. (Tr. 116.)

The skycap was alarmed by Stevens's words, particularly in light of heightened security resulting from two recent high-profile plane crashes, one involving suspected sabotage.[5] (Tr. 17.) The skycap checked the bag to get it away from Stevens (Tr. 18), and Stevens headed toward the gate for his flight (Tr. 117). The skycap advised his supervisor of the incident, who immediately contacted airport police. (Tr. 18, 21-22.) The airport police removed Stevens from the aircraft, searched his baggage, and charged him with disorderly conduct (a violation carrying a $25 fine, which Stevens paid in the weeks following the incident). (Complainant's Exhibits A-2, A-5, A-6.) The police also reported the incident to the Federal Aviation Administration (FAA). (Tr. 75.) After

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[4] A copy of the law judge's written initial decision is attached.

[5] ValuJet Flight 592 crashed in May 1996, and TWA Flight 800 crashed two months later. Newspaper articles at the time were reporting sabotage as a possible cause of the TWA crash. (Initial Decision at 2.)

conducting its own investigation, Complainant filed the instant civil penalty action against Stevens. (*Id.*)

After a hearing, the law judge found that Stevens violated 49 U.S.C. § 46302, which prohibits knowingly giving false information about an alleged attempt to carry an explosive on board an aircraft, under circumstances in which the information reasonably may be believed.[6] (Initial Decision at 3, 8.) The law judge emphasized the necessity of considering the context of the statement, because the statute expressly provides that the false information must be given "under circumstances in which the information may reasonably be believed." (*Id.* at 6.) The law judge explained that claiming that one was only joking is not a valid defense, because Congress designed the statute to prevent the alarm and disruptions that result from false information about a bomb, regardless of whether the false information was intended as a joke. (*Id.* at 4-5.)

The law judge noted that there was a factual dispute regarding the words Stevens uttered, with Stevens claiming that he only said his baggage *felt like* it had a bomb inside, while the skycap claimed Stevens said it *was* a bomb. The law judge resolved this dispute in favor of the skycap. (Initial Decision at 5-6.) The following circumstances indicated to the law judge that the skycap would have noted Stevens's words carefully:

- The skycap had been specifically trained to flag passengers who made statements regarding a bomb.
- He understood the gravity of the security issue.
- He was a credible witness.
- He had never heard a passenger say anything about a bomb, and the exchange with Stevens somewhat unnerved him.

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[6] For the text of the statute, *see supra* note 3.

- He was aware of the recent airplane disasters.
- He believed that he could lose his job if he failed to follow through properly on a perceived bomb threat.

(*Id.*) In contrast, said the law judge, Stevens tossed off the words in a casual manner, and his recollection of the incident had a self-serving element. (*Id.* at 6.) The law judge noted also that Stevens's ex-wife, who testified on his behalf, stated that he had uttered a declarative statement. (*Id.*) In any event, the law judge said it would have been a violation of the statute either way, because with human lives at stake, airport workers cannot afford to make the fine distinction between a declarative and a comparative statement. (*Id.*)

The law judge determined that the $500 civil penalty sought by Complainant struck the right balance between the factors weighing for Stevens (Stevens's quick realization of his error, his attempt to recant, and his regret) and those against him (the needless vexation and diversion of security personnel from more pressing concerns). (Initial Decision at 8-9.)

On appeal, Stevens argues that the law judge failed to take into account a significant part of the statute – *i.e.*, the limiting clause that reads "under circumstances in which the information reasonably may be believed." (Appeal Brief at 1, 4-6.) Stevens insists that no one, including the skycap and the airport police officer, truly thought he posed a threat. Otherwise, he argues, the skycap would not have picked up his bag, and the airport police officer would not have searched his bag in the crowded terminal. (*Id.* at 4, 6.)

The law judge, however, specifically addressed the circumstances in the record that led him to conclude that Stevens's words could reasonably be believed. Citing the testimony of Complainant's expert in aviation security, the law judge noted that criminals have been known to * * *. (Initial Decision at 6, citing Tr. 78.) He stated that heightened security measures were in effect following two recent high-profile plane crashes, one involving suspected sabotage; security concerns were also intensified due to the impending 50th anniversary of the United Nations and the Pope's visit in October. (Initial Decision at 7, citing Tr. 78-79.) The law judge pointed out that Stevens was * * *. (Initial Decision at 7, citing Tr. 89.) And finally, the law judge noted that when given an opportunity to explain his initial words ("It's a bomb"), Stevens repeated and elaborated the false claim ("It's a hydrogen bomb"). (Initial Decision at 7, citing Tr. 98.) Not until the skycap said, "We don't take kindly to such remarks," did Stevens recant. The skycap did not know Stevens. Indeed, he had never seen him before. He could not be sure, simply because Stevens retracted his words about a bomb, that Stevens did not pose a threat. Thus, contrary to Stevens's argument, the law judge did take into account the statute's limiting clause "under circumstances under which the information reasonably may be believed," and he correctly applied it to the facts of this case.

Stevens argues that it is unfair to hold him responsible for the heightened security in effect at the time of the incident. He asserts that he was a "victim of a system on guard." (Appeal Brief at 2.) The problem with this argument is that the statutory clause "under circumstances in which the false information reasonably may be believed" requires consideration of the context, which in this case included a high-risk environment. There is nothing unfair about this. Stevens's remarks did not occur in a

vacuum. He should have known that his remarks were inappropriate and could cause alarm and disruption. His attempt to evade responsibility for his actions by casting himself as a victim is unavailing.

Stevens argues that the law judge misconstrued the statute, because Congress intended it to apply only to situations on board an aircraft. (Appeal Brief at 5-6.) Nothing in the statute, however, limits its application to remarks made on board an aircraft.[7] It would make no sense to limit the application of the statute as Stevens suggests, given Congress' intent to eliminate alarm and disruptions resulting from false information. False information about bombs can trigger alarm and disruptions on the ground as well as on board the aircraft.

Stevens also argues that the law judge's construction of the statute will lead to chaos and abuse of power by airport workers. (Appeal Brief at 5-6.) Stevens, however, fails to explain how and why chaos and abuse of power will necessarily occur, and it is noteworthy that neither occurred in the instant case. Stevens has submitted nothing supporting the projected dire consequences, and they do not logically follow.

Finally, Stevens argues that the skycap did not act reasonably. (Appeal Brief at 3.) According to Stevens, the skycap should have opened and searched Stevens's baggage himself, as Stevens requested at the time (Tr. 118), because then the matter could have been resolved quickly and without the involvement of airport police. It is Stevens's words and actions, however – not those of the skycap – that are at issue in this case. Moreover, skycaps are * * * (Tr. 77-78); * * *. (Tr. 67.) The skycap acted

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[7] *See supra* note 3.

appropriately by following his training and reporting the incident to his supervisor, who in turn contacted airport police.

For all of these reasons, the law judge's decision assessing a $500 civil penalty is affirmed. [8]

[Original signed by Jane F. Garvey]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 17th day of December, 1998.

[8] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1998).

EXHIBIT Y

Central Vermont Railway v. *I.C.C.*, 711 F.2d 331

Commission in treating premature control as a major factor in its decision. Thus, the Commission's error, if any, was of no significance.[80]

VII. Conclusion

The ICC's approval of the Maine Central/Boston & Maine merger as a whole is *affirmed*. We *reverse* the Commission's decision denying the protective conditions sought by Lamoille Valley and Canadian National, and *remand* to the Commission to reconsider whether protective conditions (not necessarily the ones sought by Lamoille Valley and Canadian National) are needed to preserve competition or adequate transportation. On all remaining issues, the Commission's decision is *affirmed*.

CENTRAL VERMONT RAILWAY, INC., Canadian National Railway Company, and Grand Trunk Western Railroad Company, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents

Delaware and Hudson Railway Company, Guilford Transportation Industries, Inc., Intervenors.

No. 82-2136.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 25, 1983.

Decided June 28, 1983.

Petition was filed seeking review of an order of the Interstate Commerce Commission which approved unconditionally the merger of two "class I" railroads. The Court of Appeals, Wald, Circuit Judge, held that competitor of merging railroad was not entitled to protection from competitive harm due to merger by having the Interstate Commerce Commission require the merged entity to provide competitor with trackage rights over a major north-south route where the condition was not needed to preserve competition as there would be effective truck competition and where competitor failed to show that the condition was needed to prevent harm to essential services.

Affirmed in part and remanded in part.

1. Commerce ⇐85.7

Interstate Commerce Commission will consider imposing conditions on a merger of railroads to prevent significant reduction in competition to preserve substantial services.

2. Commerce ⇐85.7

Competitor of merging railroad was not entitled to protection from competitive harm due to merger by having the Interstate Commerce Commission require the merged entity to provide competitor with trackage rights over a major north-south route where the condition was not needed to preserve competition as there would be effective truck competition and where competitor failed to show that the condition was needed to prevent harm to essential services.

80. We find no merit in Providence & Worcester's remaining procedural quibbles. The ICC has broad discretion in controlling its own calendar. *See Nader v. FCC*, 520 F.2d 182, 196 (D.C.Cir.1975). It did not abuse that discretion in consolidating consideration of the reorganization plan with consideration of the merger proposal. The proceedings were clearly "interdependent." *Boston & Maine Merger*, 366 I.C.C. at 330.

Nor did the Commission abuse its discretion in failing to consolidate Guilford's later-filed application to control the Delaware & Hudson with the instant application. Rather, the Commission simply adhered to its established and reasonable policy that "[t]he proper forum for considering cumulative impacts and crossover effects [due to multiple transactions] is in a later proceeding." 49 C.F.R. § 1180.1(g) (1982). Moreover, since the Commission was bound to decide the Boston & Maine application within 180 days come hell, high water, or consolidation, consolidation would have left the Commission only 90 days to decide the later-filed Delaware & Hudson application.

Finally, the Commission did not abuse its discretion in declining to grant a few of Providence & Worcester's many discovery requests, nor in limiting the time allotted to Providence & Worcester to cross-examine opposing witnesses.

3. Commerce ⇐85.7

Interstate Commerce Commission, in declining to impose conditions on a merger of railroads, properly relied on truck competition to mitigate any reduction in rail competition.

4. Administrative Law and Procedure ⇐485

Generally, when a statute requires an agency to "consider" a factor, agency must reach an express and considered conclusion about the bearing of the factor but need not give any specific weight to the factor.

Petition for Review of an Order of the Interstate Commerce Commission.

Edward J. O'Meara, Attorney, I.C.C., Washington, D.C., with whom John Broadley, Gen. Counsel, and Henri F. Rush, Associate Gen. Counsel, I.C.C., and John J. Powers, III and Kenneth P. Kolson, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

James E. Howard, with whom Kathleen D. Hendrickson and Jeffrey M. Goldsmith, Pittsburgh, Pa., were on the brief for intervenor, Guilford Transp. Industries, Inc.

Kinga M. LaChapelle, Albany, N.Y., was on the brief for intervenor, Delaware and Hudson Ry. Co.

Robert P. vom Eigen, Washington, D.C., with whom Charles A. Spitulnik, Washington, D.C., was on the brief, for petitioners.

Before WILKEY and WALD, Circuit Judges, and BONSAL,* Senior District Judge for the Southern District of New York.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

We review here a decision of the Interstate Commerce Commission (ICC or Commission) approving unconditionally the merger of the Maine Central/Boston & Maine Railroad with the Delaware & Hudson Railroad. *Guilford Transportation Industries—Control—Delaware & Hudson Railway,* 366 I.C.C. 396 (1982) [hereinafter cited as *Delaware & Hudson Merger*].[1] Petitioner Canadian National, a competitor of the Delaware & Hudson, asked the ICC to protect it from competitive harm due to the merger by requiring the merged entity to provide Canadian National with trackage rights over a major north-south route.[2] The ICC declined to impose this protective condition, finding that the condition was not needed to preserve competition because there would still be effective truck competition and that Canadian National had not shown that the condition was needed to prevent harm to "essential services."

Canadian National appeals to this court, claiming that the ICC misanalyzed the effect of the merger on competition among rail carriers and that the ICC's "essential services" test for imposing protective conditions is too strict and does not comply with the statutory directive that the ICC consider the effect of the merger on "adequacy of transportation to the public." 49 U.S.C. § 11,344(b)(1)(A). We affirm the Commission's determination that protective conditions are unnecessary because there exists effective truck competition.

I. Background

The companion case to this one, *Lamoille Valley Railroad v. ICC,* 711 F.2d 295, 300–302 (D.C.Cir.1983) describes the statutory scheme governing mergers of two "class I" railroads and the ICC's policies on

1. The ICC had previously approved the merger of the Maine Central with the Boston & Maine. Guilford Transp. Indus.—Control—Boston & Me. Corp., 366 I.C.C. 292 (1982) [hereinafter cited as *Boston & Maine Merger*]. We review the ICC's decision concerning that merger in a companion case to this one, also issued today. *Lamoille Valley R.R. v. ICC,* 711 F.2d 295 (D.C.Cir.1983).

2. Canadian National's co-petitioners—Central Vermont Railway and Grand Trunk Western Railroad—are wholly-owned subsidiaries of Canadian National. We use the name "Canadian National" to refer to any and all of these railroads.

such mergers.[3] We incorporate that discussion by reference and pass on to the facts and issues involved in this case.

A. *The Railroads Involved in this Case*

Guilford Transportation Industries (Guilford) is a holding company that is 100% owned by Timothy Mellon. Guilford already owns the Maine Central Railroad and we approve today, in *Lamoille Valley,* Guilford's acquisition of the Boston & Maine Railroad.

Canadian National operates joint north-south service (from Montreal to New York and points south) with the Boston & Maine. Canadian Pacific also operates north-south service jointly with the Boston & Maine. Conrail and the Delaware & Hudson operate competing north-south routes.

In addition to its north-south service, Canadian National operates east-west service from Maine to the midwest in competition with Canadian Pacific and with a joint Boston & Maine/Delaware & Hudson route. All three lines connect with the Maine Central near Portland, Maine.

The Maine Central is a profitable railroad with a near-monopoly over rail service to the Maine paper and forest products industries. Prior to its acquisition by Guilford, the Boston & Maine was bankrupt. The Delaware & Hudson is all but bankrupt, kept out of bankruptcy proceedings only by continuing subsidies from the federal government and the state of New York. The Canadian National and the Canadian Pacific are large and profitable transcontinental railroads.

B. *Proceedings Below*

On January 29, 1982, Guilford applied to the ICC for permission to acquire the Delaware & Hudson. Its application was contingent on the Commission's prior approval of Guilford's proposal to acquire the Boston & Maine. Guilford's plan to make the Delaware & Hudson profitable depended in part on diverting north-south traffic from the joint Canadian National/Boston & Maine and Canadian Pacific/Boston & Maine lines to the Delaware & Hudson line and diverting east-west traffic from the Canadian lines to the Boston & Maine/Delaware & Hudson east-west line.

Canadian National did not oppose the overall merger of the Maine Central and the Boston & Maine with the Delaware & Hudson. It was concerned, however, that Guilford might seek to increase traffic diversion from the Boston & Maine/Canadian National north-south route to the competing Delaware & Hudson route by allowing the Boston & Maine's north-south service to deteriorate. This would reduce the time advantage of the Boston & Maine/Canadian National route over the Delaware & Hudson route. Canadian National therefore requested trackage rights over the Boston & Maine's portion of the Boston & Maine/Canadian National Line.

Canadian National also argued to the Commission that, after acquiring the Delaware & Hudson, Guilford will have an incentive to delay the interchange of traffic between the Maine Central and the Canadian National. This would reduce the time advantage of Canadian National's east-west route and permit Guilford to increase traffic diversion from the Canadian National route to the competing Boston & Maine/Delaware & Hudson route. Canadian National therefore asked the ICC to require Guilford to maintain current interchange service at Danville and Yarmouth Junctions, Maine, where it exchanges traffic with the Maine Central.[4]

The ICC approved the merger and denied Canadian National's request for protective

3. The ICC defines "class I" railroads as those railroads with annual operating revenues of $50 million or more. 49 C.F.R. § 1240.1(a) (1982). Under that definition, the Maine Central, the Boston & Maine, and the Delaware & Hudson are all class I railroads.

4. Canadian Pacific also sought protective conditions before the ICC and petitioned this court for review, but later made its separate peace with Guilford and withdrew its petition for review. Conrail also sought various conditions before the ICC but did not petition this court for review.

conditions. It found that the "primary public benefit" from the merger was "the lifeline it will provide to the ailing D & H," without which it was "unlikely that D & H could continue to operate in light of its continuing losses and negative cash flow." *Delaware & Hudson Merger,* 366 I.C.C. at 400–01.

The Commission recognized that the merger would reduce north-south rail competition because Guilford would participate in three of the four available routings. It did not view this as a serious problem, however, because of effective truck competition—"all the [north-south] traffic . . . is potentially subject to diversion to motor carriage." *Id.* at 407. Moreover, the Boston & Maine's north-south line (the Connecticut River line, which runs through Massachusetts and Connecticut) and the Delaware & Hudson's line (which lies west of the Hudson River in New York) were "not perfect substitutes for each other." *Id.* at 408. With regard to possible downgrading of the Boston & Maine's portion of the joint Boston & Maine/Canadian National north-south line, the Commission found that service over that line "cannot be deemed essential" because truck service was available. *Id.* at 420.

As for possible downgrading of interchange service at Danville and Yarmouth Junctions, the Commission had already addressed that issue in its *Boston & Maine* decision. Its reasons for denying relief in that decision—principally Guilford's lack of intent to downgrade and Canadian National's competitive leverage—were "equally applicable here." *Id.* at 419.

C. *Issues Presented*

Canadian National argues that the ICC misanalyzed the anticompetitive effects of the merger and Guilford's incentives to downgrade the Boston & Maine's north-south service and the Danville and Yarmouth Junction interchanges.[5] Intervenors Guilford and Delaware & Hudson support the ICC's decision. For the reasons given in *Lamoille Valley,* 711 F.2d at 315–323, we conclude that the Commission failed adequately to explain why Guilford would not downgrade service at Danville and Yarmouth Junctions. We therefore remand to the Commission on this issue. With regard to north-south service, we affirm the Commission's conclusion that the merger will neither substantially reduce competition nor affect essential services.

II. The Merger's Effect on North-South Rail Service

We incorporate by reference the statement of the standard of review in *Lamoille Valley,* 711 F.2d at 301 n. 3, 307–308, and pass on to analysis of the ICC's denial of Canadian National's request for north-south trackage rights.[6]

[1, 2] As discussed in *Lamoille Valley,* 711 F.2d at 302, 310, the Commission will consider imposing conditions on a merger for two reasons—to prevent significant reduction in competition and to preserve "essential services." The Commission found that

5. Canadian National raises one other claim that was addressed in *Lamoille Valley* and can be disposed of quickly. Canadian National argues that the expedited procedural schedule used by the ICC in considering the merger was a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 551(4), 553, and was improperly issued without notice and comment. For the reasons given in *Lamoille Valley,* 711 F.2d at 326–329, we hold that the schedule is exempt from the APA's notice and comment requirements as a "rule[ ] of agency . . . procedure." 5 U.S.C. § 553(b)(A).

6. The ICC asserts that since the Northeast Rail Service Act of 1981 (NERSA), § 1164(a), 45 U.S.C. § 1112(b), required the ICC to issue a decision on Guilford's proposal to acquire the Delaware & Hudson within 180 days "with or without a hearing," a hearing was not required by statute and therefore the standard of review is "arbitrary and capricious," 5 U.S.C. § 706(2)(A), rather than "substantial evidence," *id.* § 706(2)(E). We need not decide whether Congress, in enacting NERSA, meant to change the well-established substantial evidence standard for review of ICC merger decisions, for any possible difference between the two standards of review would not affect our decision in either this case or *Lamoille Valley.*

neither reason for imposing conditions was present here. We agree.

A. *Anticompetitive Effects*

The Commission found that Guilford's participation in three of the four north-south routes would not have serious anti-competitive consequences because there was strong truck competition. The presence of truck competition limited the importance of reduction in rail competition. *See Delaware & Hudson Merger,* 366 I.C.C. at 407 ("A change in the number of rail competitors is less significant where there is strong motor carrier competition ...."). Also, truck competition would make it impractical for Guilford to seek to divert traffic to the Delaware & Hudson by downgrading service on Boston & Maine's north-south line:

> The extent to which any rail carrier can exercise control over traffic is greatly diminished in the face of intense motor carrier competition. If rail carriers want to preserve traffic in these circumstances, they cannot afford to favor inefficient routes over efficient ones, even if this means that they will not preserve their longest possible haul.

Id. at 409. Canadian National raises several objections to this analysis.

1. *Including Trucks in the Product Market*

[3] First, Canadian National argues that the Commission improperly relied on *truck* competition to ameliorate the substantial lessening of *rail* competition caused by the merger. It would have the Commission focus exclusively on rail competition. In antitrust terms, the Commission, in effect, defined the relevant product market as "transportation of freight," while Canadian National argues that "[t]he product [market] is the transportation of goods *by rail only.*" [7] We believe the Commission properly considered truck competition.

The Interstate Commerce Act broadly instructs the ICC to determine if a merger is "consistent with the public interest." 49 U.S.C. § 11,344(c). Canadian National relies on Congress' instruction to the Commission to "consider," in making that public interest determination, "whether the proposed transaction would have an adverse effect among *rail carriers* in the affected region." *Id.* § 11,344(b)(1)(E) (emphasis added).[8]

Section 11,344(b)(1) also, however, permits the Commission to consider factors other than those specifically listed; it provides that "the Commission shall consider *at least* the following ...." (Emphasis added.) The legislative history of § 11,344(b)(1)(E) confirms that the subsection merely codifies prior ICC practice and does not restrict the factors that the ICC may consider. As Congressman Panetta explained in introducing the provision as a floor amendment to the Staggers Rail Act of 1980:

> My amendment is not intended to in any way tie the hands of the ICC on the question of mergers.... [C]ompetition plays an important role in the Commission's decisionmaking on railroad mergers. This is as it should be. My amendment would insure that this remains the case.

126 Cong.Rec. H8604 (daily ed. Sept. 9, 1980).

Thus, the Commission may consider "intermodal" competition between truck and

7. Canadian National Brief at 35 (emphasis added).

8. 49 U.S.C. § 11,344(b)(1) provides:

> In a proceeding under this section which involves the merger or control of at least two class I railroads ..., the Commission shall consider at least the following:
> (A) the effect of the proposed transaction on the adequacy of transportation to the public.
> (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.
> (C) the total fixed charges that result from the proposed transaction.
> (D) the interest of carrier employees affected by the proposed transaction.
> (E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

rail, so long as it also considers "intramodal" competition among rail carriers. *Accord Gilbertville Trucking Co. v. United States,* 371 U.S. 115, 127, 83 S.Ct. 217, 224, 9 L.Ed.2d 177 (1962) ("The statute entrusts the Commission with the duty to decide what considerations other than those specifically mentioned ... should be given weight.").

The only remaining question is whether the Commission has authority to give dominant weight to rail-truck competition, as it did when it concluded that reduction in competition among rail carriers is of little moment in light of vigorous rail-truck competition. We hold that the Commission has this power.

[4] As a general rule, when a statute requires an agency to "consider" a factor, the agency must reach "an 'express and considered conclusion' about the bearing of [the factor], but need not give 'any specific weight' to th[e] factor." *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency,* 705 F.2d 506, 516 (D.C.Cir.1983) (Clean Air Act) (quoting *Weyerhaeuser Co. v. Costle,* 590 F.2d 1011, 1045 (D.C.Cir.1978) (Clean Water Act)). In this case, the ICC properly considered the relevance of competition among rail carriers, explaining that:

> A change in the number of rail competitors is less significant where there is strong motor carrier competition which prevents carriers from obtaining and exploiting monopoly power.

Delaware & Hudson Merger, 366 I.C.C. at 407.

We think it appropriate to follow that general rule here. A major impetus behind the deregulation of railroads in the Staggers Rail Act of 1980 was Congress' recognition that railroads generally had to compete with other modes of transportation. *See, e.g.,* H.R.Rep. No. 1430 (Conf.Rep.), 96th Cong., 2d Sess. 79 (1980), *reprinted in* 1980 U.S.Code Cong. & Ad.News 4110:

> [H]istorically the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly power by railroads .... However, today, most transportation is competitive and many of the Government regulations affecting railroads have become unnecessary and inefficient. Nearly two-thirds of intercity freight is transported by modes of transportation other than railroads.

If Congress can rely on truck-rail competition to obviate the need for regulation, surely the ICC can do so as well. This is especially so in light of the congressional policy "to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10,101a(2).

Moreover, in considering truck-rail competition, the ICC was following the accepted antitrust definition of a "product market": Two products belong in a single product market if they are "regarded by consumers as ... close substitutes." 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 52a (1978).[9] If truck and rail transport are good substitutes for each other in the Montreal-to-New York corridor, it makes no sense in terms of antitrust policy to treat them, as Canadian National wants to, as if they were not. We will not lightly impute to Congress an intent to foreclose the ICC from following the antitrust principles incorporated in the antitrust laws.[10]

2. *The Existence of Truck Competition*

Canadian National also disputes whether trucks in fact provide strong competition in

9. *See also Brown Shoe Co. v. United States,* 370 U.S. 294, 325, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use ... between the product itself and substitutes for it.") (footnote omitted); Union Pac. Corp.—Control—Missouri Pac. Corp., 366 I.C.C. 459, 503–04 (1982) (applying the *Brown Shoe* definition of product market), *appeal filed sub nom. Southern Pac. Transp. Co. v. ICC,* No. 82–2253 (D.C.Cir. argued June 6, 1983).

10. We hold only that the ICC *may* evaluate anticompetitive effects in terms of the "product markets" and "geographic markets" used in antitrust law, not that it must do so. *See Seaboard Air Line R.R. v. United States,* 382 U.S. 154, 86 S.Ct. 277, 15 L.Ed.2d 223 (1965) (per curiam) (ICC need not directly apply antitrust analysis in reviewing a rail merger).

the Montreal-to-New York corridor. We think that substantial evidence supports the Commission's finding that they do.

The Commission explained that it relied both on analysis of the principal commodities carried by the Delaware & Hudson and on testimony by shippers:

> The commodities the D & H and B & M carry over these routes are generally commodities for which rail service is not considered market dominant. [Guilford] submitted verified statements from [three] shippers of pulp and paper which it serves. [The shippers] all testify that there is motor carrier competition for this traffic.

Delaware & Hudson Merger, 366 I.C.C. at 407. Canadian National correctly notes that two of the three shippers cited by the Commission are Maine paper companies who appear to use mostly the Boston & Maine/Delaware & Hudson east-west route.[11] Thus, only one shipper could testify directly to the existence of truck competition for north-south freight movement.

Even Canadian National's witnesses, however, admitted the existence of *some* truck competition.[12] Moreover, Canadian National apparently concedes that rail service is not "market dominant," *i.e.,* that the commodities now carried by rail are susceptible to truck competition. *See* Canadian National Brief at 21 n. 23. Finally, the ICC could properly rely, as Congress did in deregulating railroad rates in 1980, on the well-known fact that railroads carry only about one-third of all intercity freight and that "the railroads' decline in market share seems to cut across . . . almost every commodity group." [13] Putting these various pieces together, we find sufficient support for the ICC's finding that there is pervasive truck competition for north-south traffic.

3. *Geographic Market*

Canadian National also contends that the ICC misanalyzed the relevant "geographic market" within which competitive effects must be assessed. It points to the ICC's statement that the Delaware & Hudson line and the Canadian National line "serve different geographic markets and are not perfect substitutes for each other." *Delaware & Hudson Merger,* 366 I.C.C. at 408. Canadian National argues that if the two lines compete for the same traffic, they are necessarily in the same "geographic market" as that term is used in antitrust analysis.[14]

This looks to us to be no more than a semantic quibble. Concededly, the Commission used the term "geographic market" loosely. The two rail lines are in separate geographic markets only for local traffic, and are in the same geographic market for most long-haul traffic. But the ICC unquestionably recognized this. In the same sentence in which the phrase "geographic market" appears, the Commission explained that the two lines were not "perfect" substitutes; it did not say that they were not

11. *See* Verified Statement of Robert Ricker, Transportation Manager, Georgia-Pacific Corp., at 2 (Jan. 8, 1982), *reprinted in* Joint Appendix (J.A.) at 133, 134; Verified Statement of Charles Hill, Staff Transportation Manager, Scott Paper Co., at 4 (Jan. 13, 1982), J.A. at 135, 136.

12. Verified Statement of Robert Walker, Assistant Vice President, Grand Trunk Western Railroad, at 7–8 (Mar. 29, 1982), J.A. at 137, 143–44 ("Although motor carriers are a factor in this market, railroads have a decided advantage . . . ."); Supplemental Verified Statement of Phillip Larson, General Manager, Central Vermont Railway, at 14 (May 19, 1982), J.A. at 214, 227 (for most poultry growers on Canadian National's line, there is "no alternative to [rail] service other than higher priced motor carrier shipments"). One shipper who testified in favor of Canadian National's proposal was even more explicit. *See* Verified Statement of Allan Baldwin, Traffic Manager, Erwing Paper Mills, at 2 (Mar. 23, 1982), J.A. at 184, 185 ("faster truck service has already resulted in the loss of much rail business to truckers").

13. H.R.Rep. No. 1035, 96th Cong., 2d Sess. 38 (1980), *reprinted in* 1980 U.S.Code Cong. & Ad.News 3978, 3983.

14. The ultimate test for inclusion of two producers in a market, whether "product" market or "geographic" market, is reasonable substitutability of use. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 518 (1978); *United States v. Marine Bancorp.,* 418 U.S. 602, 619, 94 S.Ct. 2856, 2868, 41 L.Ed.2d 978 (1974).

substitutes at all. Elsewhere in its decision, the ICC stated that the lines "compete for . . . overhead traffic." Indeed, if the two lines really served entirely separate geographic markets, the Commission's whole analysis of anticompetitive effects would have been pointless.

In sum, we find reasonable the Commission's reliance on truck competition to mitigate any reduction in rail competition.[15]

B. *Essential Services*

> The ICC defines "essential services" as: A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

49 C.F.R. § 1180.1(c)(2)(ii) (1982). The Commission concluded that Canadian National's north-south service did not warrant protective conditions because it was not "essential." Canadian National challenges that conclusion.[16]

The ICC explained that Canadian National's "overhead" service ("overhead" freight is freight that neither originates nor terminates on a particular line) was not essential "because there are other routes over which the traffic can move." *Delaware & Hudson Merger,* 366 I.C.C. at 420. As for Canadian National's local service, Canadian National had developed no evidence that this service was essential either:

> [Canadian National] has not shown that any of the shippers located on its line cannot be served by truck. Nowhere in the record has it been shown that any of the customers would go out of business if [Canadian National's] rail service would be terminated. There is absolutely no evidence with regard to prevailing rates in its corridors. There is no analysis as to whether the commodities carried are market dominant commodities. Thus the service it provides cannot be deemed essential.

Id.

We understand the Commission to be suggesting several types of evidence that Canadian National might have offered, but did not, to show that alternate service was inadequate: evidence on "prevailing rates" for rail and truck service; evidence on whether rail service is "market dominant" for the commodities that Canadian National carries; and evidence on whether shippers would go out of business if they lose rail service. Canadian National does not object to the ICC's assessment of the evidence.[17] It asserts that the Commission should have required Guilford to prove that alternate service was adequate, instead of requiring Canadian National to prove that alternate service was inadequate.[18]

We have no trouble upholding the Commission's approach. Especially in an expedited proceeding such as this one,[19] the Commission can reasonably expect a party seeking protective conditions to make a prima facie case on why it needs them. Prevailing rates are obviously relevant to the question whether truck service is an adequate substitute for rail. Market dominance is also clearly relevant. If rail service is not market dominant for a particular commodity, that suggests that most ship-

15. In light of this conclusion, we need not address Canadian National's claim that the Commission underestimated the extent to which the merger would reduce rail competition.

16. In addition to challenging the "essential services" test *as applied* in this case, Canadian National argues that the test, *on its face,* is inconsistent with the Interstate Commerce Act. We uphold the facial validity of the essential services test for the reasons given in *Lamoille Valley,* 711 F.2d at 309, 310.

17. In support of its request for trackage rights, Canadian National submitted only conclusory statements by shippers that its service was "essential." *See, e.g.,* Verified Statement of Leonard Morrill, Traffic Manager, A.D. Pease Grain Co., at 1 (Mar. 25, 1982), J.A. at 182, 182; Verified Statement of William Felmly, Director of Transportation, Saxon Industries, at 2 (Mar. 26, 1982), J.A. at 190, 191.

18. *See* Canadian National Reply Brief at 10.

19. Congress had ordered the ICC to decide the Delaware & Hudson's merger application within 180 days, as compared to the normal 31-month merger proceeding. *See* note 5 *supra; Lamoille Valley,* 711 F.2d at 326, 327.

pers who ship or receive that commodity can switch to truck without incurring serious harm. *Cf.* 49 U.S.C. § 10,709(a) (" 'market dominance' means an absence of effective competition from other carriers or modes of transportation").

The Commission's reference to shippers being forced out of business is more troublesome. We hold today in *Lamoille Valley,* 711 F.2d at 310–313, that the Commission cannot *equate* the ability of shippers to stay in business with the existence of adequate alternative transportation. But adequacy is a matter of degree. The fact that no shippers will go out of business, although insufficient to *prove* that alternate service is adequate, is relevant evidence on the question of adequacy because it places a rough upper limit on the cost difference between truck and rail. Thus, the Commission did not err in giving at least some weight to this factor.

In sum, the ICC reasonably concluded that Canadian National failed to establish a significant probability that its services were essential.[20]

III. Conclusion

The ICC reasonably concluded that Canadian National's north-south rail service is neither essential to local shippers nor needed to provide effective competition to Guilford's north-south service. For the reasons given in *Lamoille Valley,* we *remand* on the issue of downgrading of interchange service at Danville and Yarmouth Junctions, Maine. In all other respects, the Commission's decision approving Guilford's acquisition of the Delaware & Hudson and denying Canadian National's request for protective conditions is *affirmed.*

20. In light of this conclusion, we need not reach Canadian National's claim that losses due to traffic diversion will force it to abandon its current north-south service. However, to the extent that the ICC focused on whether diversion losses were a large percentage of Canadian National's gross revenues rather than on the future profitability of Canadian National's north-south line, *see Delaware & Hudson Merger,* 366 I.C.C. at 419–20, we have disapproved that analysis in *Lamoille Valley,* 711 F.2d at 316–317.

Peter D. COBURN, Appellant

v.

PAN AMERICAN WORLD AIRWAYS, INC.

No. 82-1543.

United States Court of Appeals, District of Columbia Circuit.

Argued April 29, 1983.

Decided June 28, 1983.

Certiorari Denied Nov. 28, 1983. See 104 S.Ct. 488.

In suit by terminated employee alleging age and sex discrimination, plaintiff appealed from entry of judgment n.o.v. by the United States District Court for the District of Columbia, John H. Pratt, J., on age discrimination claim and from judgment in favor of defendant on the sex discrimination claim. The Court of Appeals, Ray McNichols, Senior District Judge, sitting by designation, held that: (1) plaintiff made out a prima facie case on the age discrimination claim; (2) direct evidence of discrimination was not required to make out a prima facie showing even though reduction in force was involved; (3) employer carried burden of proffering legitimate, nondiscri. inatory reasons for terminating plaintiff; (4) plaintiff failed to carry his burden of proving discriminatory motive by a preponderance of the evidence; and (5) finding of no sex discrimination was not clearly erroneous.

Affirmed.

1. Federal Civil Procedure ⇐2608

Award of judgment n.o.v., like grant of directed verdict, is not proper unless the evidence, together with all inferences that can be reasonably drawn therefrom, is so

EXHIBIT Z

WKAT, Inc. v. *FCC*, 296 F.2d 375

stoppages an agent of the Union told the president of U. S. Hardware that the pressure generated by the work stoppage could be relieved if Hardware signed a contract with the Union. This fact was testified to by Hardware's president and was flatly denied by the Union agent. The Board accepted the Examiner's finding and conclusion. The Union argues that, even though the Examiner purported to make this finding by resolving the credibility of the witnesses, it is implausible in view of the fact that it was Hardware which initiated conversations with the Union looking toward a contract. We think the conclusion was supported by substantial evidence. As we have already stated, recognition of the Union by the rack-jobbers was clearly an alternative means of settling the dispute, and this was perfectly clear to the rack-jobbers. The record plainly shows that the Union encouraged the rack-jobbers to get a "release" from the Teamsters so that the delivery employees of the rack-jobbers might join the Retail Clerks. Under the circumstances the testimony of Hardware's president was entirely plausible, and we think it is sufficient to support the conclusion.

In a footnote to its brief the Board makes the following assertion:

> "The only difference between the two violations is the existence of a recognition objective in Section 8(b) (4) (B). All Section 8(b) (4) (B) violations are also Section 8(b) (4) (A) violations."

We think this statement is too broad. We think we can visualize efforts to force recognition of an uncertified bargaining representative, which efforts do not also seek a cessation of business. A union might well seek recognition from another employer but at the same time be most reluctant to see the business cease or even lessen. This case may possibly be an example. A recognition object need not always be implemented by cessation of business. So we think there is no inconsistency in our holding that clause (B) was violated even though clause (A) may not have been violated.

[3] The Union also argues that the Board's cease and desist order is too broad. We agree. We think the portion of the order which we affirm should be modified to correspond to the violations actually found to have been committed.

Affirmed in part as modified; set aside and remanded in part.

WKAT, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

Public Service Television, Inc., L. B. Wilson, Inc., Intervenors.

EASTERN AIRLINES, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee.

Public Service Television, Inc., L. B. Wilson, Inc., Intervenors.

NORTH DADE VIDEO, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee.

Elzey ROBERTS, Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee.

Nos. 13718, 14021, 14170, 13725, 16089, 16091.

United States Court of Appeals
District of Columbia Circuit.

Preliminary Order and Memorandum Dec. 23, 1960.

Argued March 22, 1961.

Opinion on the Merits July 6, 1961.

Certiorari Denied Oct. 9, 1961.

See 82 S.Ct. 63.

Proceeding to review the granting of a construction permit for a television station. The Court of Appeals, 103 U.S App.D.C. 324, 258 F.2d 418, on the mo-

tion of the Federal Communications Commission, remanded the case to the Commission. The Court of Appeals, Prettyman, Circuit Judge, held that, the attempts of several of the applicants for television station to influence results by factors unrelated to the merits justified their disqualification by Commission which, under the circumstances, was within its authority in granting license for four months only to the original applicant which was not involved in irregular activities.

Original grant of award reversed and case remanded to Commission with instructions.

1. Telecommunications ⇐424

Where unsuccessful applicants petitioned for review of order granting television station permit, and Court of Appeals remanded case for further findings by Federal Communications Commission, which made purported order granting permit to another, merits were before Court of Appeals either by original appeals or by appeals from purported order.

2. Telecommunications ⇐427

In view of Federal Communications Commission's action in staying changeover of operators resulting from granting television station permit to some one other than party who had been granted original permit, motion to Court of Appeals for further stay pending determination of merits was unnecessary.

Supplemental Opinion

3. Administrative Law and Procedure ⇐441

Applicant who with evil intent ceases to depend upon justice of case and seeks discriminatory and favored treatment is entitled to no benefits under adjudicatory functions of administrative agency.

4. Telecommunications ⇐416

Attempts of several applicants for television station to influence results by factors unrelated to merits justified their disqualification by Federal Communications Commission and, under circumstances, Commission was within authority in granting only four month license to original applicant which was not involved in irregularities. 5 U.S.C.A. § 1037(c).

5. Telecommunications ⇐426

Court of Appeal which remanded order to Federal Communications Commission while retaining jurisdiction of appeals intended Commission to formulate orders it deemed appropriate and report back its recommendations to Court of Appeals which would then consider new findings and orders. 5 U.S.C.A. § 1037 (c).

6. Administrative Law and Procedure ⇐820

Section of Administrative Procedure Act providing that agency after remand for adducement of additional evidence shall file with court its new findings and order does not contemplate that agency can moot appeal during remand and foreclose court's consideration of its conclusions upon additional evidence. 5 U.S.C.A. § 1037(c).

Messrs. Paul A. Porter, George Bunn, G. Duane Vieth, James O. Juntilla and L. Reed Miller, Washington, D. C., for appellant WKAT, Inc.

Mr. Harold L. Russell, Atlanta, Ga., for appellant Eastern Airlines, Inc.

Messrs. A. Harry Becker and Alexander Boskoff, Washington, D. C., for appellant North Dade Video, Inc.

Messrs. Andrew G. Haley and J. Roger Wollenberg, Washington, D. C., for Elzey Roberts, appellant in No. 16091 and amicus curiae in Nos. 13718, 13725, 14021 and 14170. Mr. Michael H. Bader also entered an appearance for Elzey Roberts as amicus curiae in Nos. 13718, 13725, 14021 and 14170.

Messrs. John L. Fitzgerald, Gen. Counsel, Max Paglin, Asst. Gen. Counsel, and Joel Rosenbloom, Counsel, Federal Communications Commission, Washington, D. C., for appellee.

Messrs. Paul M. Segal and Robert A. Marmet, Washington, D. C., for L. B. Wilson, Inc., intervenor in Nos. 13718, 13725, 14021 and 14170.

Messrs. Norman E. Jorgensen, Washington, D. C., and William I. Denning, Washington, D. C., for Public Service Television, Inc., intervenor in Nos. 13718, 13725, 14021 and 14170.

Mr. Richard A. Solomon, Washington, D. C., for the United States, amicus curiae in Nos. 13718, 13725, 14021 and 14170.

Before PRETTYMAN, WASHINGTON, and DANAHER, Circuit Judges, in Chambers.

Order—Dec. 23, 1960.

PER CURIAM.

It appearing that intervenor Public Service Television, Inc. has filed a motion to direct appellee to vacate its purported order of July 14, 1960, to transmit the record made on the remanded issues and to direct the parties to file supplemental briefs, and that the aforesaid intervenor has also filed a motion to stay the effective date of the Commission's order of July 14, 1960, that the United States of America has filed a motion for leave to file a brief and argue orally as amicus curiae in these cases, that Elzey Roberts has filed a motion to intervene as amicus curiae in these cases and has also filed a motion for leave to file a reply to appellee's objection to the motion for stay, that intervenor L. B. Wilson, Inc. has filed a motion to expedite consideration of the motion for a stay and that appellant in case No. 16089 has filed a motion to consolidate that case with cases Nos. 13718, 13725, 14021, and No. 14170, and that objections and replies to some of the aforesaid motions have been filed and considered by the court, and it further appearing that case No. 16091, Elzey Roberts v. Federal Communications Commission, arises from the same proceedings as do the above cases, it is

Ordered by the court that insofar as intervenor Public Service Television, Inc. moves to vacate appellee's order of July 14, 1960, its motion is held in abeyance, that insofar as said intervenor moves to transmit the record made on the remanded issues, said motion is granted, and that insofar as said intervenor moves that this court direct the parties to file supplemental briefs, said motion is dismissed as unnecessary in view of the procedures set forth hereinafter respecting the filing of briefs.

It is Further Ordered by the court that the motion of intervenor Public Service Television, Inc. to stay the effective date of the appellee's order of July 14, 1960, is held in abeyance; that the request contained in the Commission's opposition to the motion for a stay that an affirmative order be entered permitting the Commission's decision of July 14, 1960, to become effective 15 days after the ruling of this court pending ultimate review of the decision on the merits, is denied; and that the motion of L. B. Wilson, Inc. to expedite consideration of the motion for a stay is denied.

It is Further Ordered by the court that the United States of America and Elzey Roberts are each allowed to file briefs as amici curiae and to participate in the oral argument, and that the motion of Elzey Roberts for leave to file a reply to appellee's objection to the motion for stay is granted.

It is Further Ordered by the court that the motion of appellant in No. 16089 to consolidate that case with cases Nos. 13718, 13725, 14021, and No. 14170 is granted, and it is

Further Ordered by the court, sua sponte, that case No. 16091, Elzey Roberts v. Federal Communications Commission, is consolidated with the aforesaid cases for purposes of briefing and oral argument.

It is Further Ordered by the court that the parties are directed to proceed forthwith, in accordance with the following schedule, to prepare the cases for presentation upon the merits of the actions taken, or proposed to be taken, by the Commission in its order of July 14, 1960:

Counsel for all parties will report to the court on or before December 28, 1960, whether they have been able to agree upon a statement of the questions

presented upon these appeals under the foregoing directions of the court. In the event of inability to agree upon a statement of the issues, each party may state in its brief its view of the questions presented. The court has been advised by the Commission that the record upon which its order of July 14th was premised will be forthwith filed with the Clerk of this court. Briefs on behalf of Public Service Television, Inc. and North Dade Video, Inc. will be filed on or before the 25th day after the record is filed. Briefs on behalf of L. B. Wilson, Inc. and the Commission will be filed on or before the 15th day after the briefs of Public Service Television, Inc. and North Dade Video, Inc. have been filed. Briefs on behalf of the United States, as amicus curiae, and on behalf of Elzey Roberts will be filed on or before the 15th day after the briefs of Public Service Television, Inc. and North Dade Video, Inc. have been filed. Reply briefs will be filed on or before the 10th day after the last of the foregoing briefs is filed.

All briefs may be filed in typewritten form, to be followed by printed briefs within ten days after such filing.

The joint appendix will be prepared and filed within 25 days after the last of the briefs-in-chief has been filed.

WASHINGTON, Circuit Judge, did not participate in this order.

Memorandum.

PRETTYMAN, Circuit Judge.

This Memorandum is in explanation of the order being entered in these proceedings as of this date.

On February 8, 1957, the Federal Communications Commission granted an application of Public Service Television, Inc., for a construction permit for a new television station to operate on Channel 10 in Miami, Florida. Other applicants for the permit had been WKAT, Inc., L. B. Wilson, Inc., and North Dade Video, Inc. The four applications had been considered in a comparative hearing. WKAT, Inc., petitioned this court for review of the grant of the permit (No. 13718 in this court).

Eastern Airlines, Inc., having been denied intervention before the Commission, also petitioned for review of the order and the denial of intervention (No. 13725 in this court).

Appellant WKAT, Inc., moved for a stay of the Commission order, and, on March 7, 1957, that motion was denied.

The Commission, upon the application of Public Service Television, Inc., the successful applicant, granted a modification of the construction permit. Appellant WKAT, Inc., protested the modification, its protest was denied, and it appealed from the denial (No. 14021 in this court).

Appellant WKAT, Inc., moved the Commission to reopen the comparative hearing, the motion was denied, and WKAT, Inc., appealed (No. 14170 in this court). The four cases were consolidated for briefing and argument. Appellants' brief was filed.

On March 13, 1958, the Commission moved the court to remand the cases for reconsideration. The Commission stated that public charges had been made in the course of a Congressional investigation that one of the Commissioners who had participated in the proceedings should have disqualified himself and that some of the applicants for the permit may have conducted themselves in a manner which might affect the Commission's basic determinations.

On March 14, 1958, a brief for the appellee was filed. Answers to the motion to remand were filed. The motion was argued orally. On April 17, 1958, the court remanded the cases to the Commission, with instructions that it hold an evidentiary hearing upon the allegations in the motion to remand, that the Commission make findings as a result of the hearing, and that the Commission report its findings to the court and recommend such disposition of the appeals as seemed to it necessary or desirable. The court ordered that it retain jurisdiction pending receipt of the findings and

report of the Commission. The Commission filed a petition for clarification of the remand order. The Commission stated that the court's language could be interpreted as authorizing the Commission "to reach ultimate findings or conclusions, subject to judicial review," or it could be construed to mean that the Commission would in effect operate merely as a special master for the court. The Commission stated that its view was that it was the obligation of the Commission to determine initially the competence to participate of its individual members and the basic qualifications of applicants for permits; that it would not be appropriate for such determinations to be made originally by the court upon the basis of findings of fact developed at an evidentiary hearing; and it asked the court to make clear that in the order of remand the court was not attempting to preclude the Commission from setting aside the basic grant, it being understood that this interpretation of the order did not affect in any way the obligation of the Commission to make recommendations to the court with respect to the disposition of the appeals. The court ruled that the Commission indicated a correct understanding of the order of remand and that the Commission would report to the court its findings upon the additional evidence and would also report its modified order, if any, or the order, if any, setting aside the original order, and that the Commission would make recommendations as to the appeals in the light of its findings and of its proposed order, or orders. The petition for clarification was denied as being unnecessary.

In accordance with the remand order, the Commission made a progress report to the court and later, on July 22, 1960, a final report. Attached to the latter was a copy of a Commission decision released July 14, 1960, containing, *inter alia*, the Commission's findings of fact. The decision purported to set aside the original order granting the permit to Public Service Television, Inc.; to hold that three of the original applicants (Public Service Television, Inc., WKAT, Inc., and North Dade Video, Inc.) be disqualified to receive a grant; and to grant the permit to the sole remaining qualified applicant, L. B. Wilson, Inc. In its report the Commission expressed the view that the report did not automatically bring the decision of July 14th before the court for review, but that the decision was a final order granting one application and denying other applications, and that the order was reviewable in normal course by petition for review.

Petitions for reconsideration of the order of July 14, 1960, were filed with the Commission. Public Service Television, Inc., then moved the court to direct the Commission to vacate the order of July 14, 1960, and to transmit to the court the record of its hearings on the remand. L. B. Wilson, Inc., treating the foregoing motion as a notice of appeal, filed with the court a notice of intervention. Public Service Television, Inc., filed a motion which, among other things, asked the court to stay the effective date of the July 14th order until the motion to vacate had been acted upon. On September 21, 1960, the Commission stayed its order of July 14th until fifteen days after the court should have disposed of the motion for a stay filed by Public Service Television, Inc. The court, by order, directed that the proceedings be held in abeyance pending a report from the Commission upon the petitions for reconsideration then pending before it.

Elzey Roberts moved the court for leave to intervene in the appeals as *amicus curiæ*. He had petitioned the Commission for leave to file an application for the permit to operate on Channel 10 in Miami. The Commission denied the petition. Roberts had also filed with the Commission a petition for reconsideration of the order of July 14th, and that petition was also denied. Roberts petitioned for review of the denial of his motion for reconsideration (No. 16091 in this court).

North Dade Video, Inc., filed a petition for review of the order of July 14, 1960 (No. 16089 in this court).

The United States filed a motion to intervene as *amicus curiæ*.

On November 15, 1960, the Commission reported to the court that all pending petitions for reconsideration had been acted upon and no other sets of petitions were then outstanding. A motion to consolidate the appeal of North Dade Video, Inc. (No. 16089) with the other pending appeals was filed.

[1] It is apparent that the basic substance of the Commission's purported order of July 14, 1960, was (1) to set aside the original grant to Public Service Television, Inc.; (2) to determine that three of the original applicants (Public Service Television, Inc., WKAT, Inc., and North Dade Video, Inc.) were disqualified, by reason of improper activity in the proceedings before the Commission, from receiving a grant; and (3) to award the permit to L. B. Wilson, Inc. The validity of the foregoing actions, or proposed actions, constitutes the issues to be decided by the court. If the order of July 14th be deemed to be a proposed order, reported to the court as a recommended action, the merits of the order are before the court in the original appeals, as to which the court retained jurisdiction. If the order of July 14th be deemed to be a final order of the Commission, appealable under the ordinary procedure relating to petitions for review, the merits of the order are before the court in the appeal of North Dade Video, Inc. In either event the substance of the matter is that the court has before it for consideration the validity of these several actions of the Commission.

It was the purport and intent of the court's order of remand that the Commission would report to the court its recommendations as to an appropriate order to be entered by the Commission upon the applications for the permit. However the court is not disposed to decide on this record at this time whether the order of July 14th was a proposal or was a final appealable order. This case, long delayed, has become ensnarled in procedural technicalities. The court therefore will undertake consideration of the merits of the question before it, since, under whatever procedural concept may be adopted, those merits are here for consideration.

Accordingly the motion to vacate the order of July 14th will be held in abeyance.

[2] The factual situation as to the operation of the station on Channel 10 in Miami is that Public Service Television, Inc., the permittee under the original order of the Commission, is now on the air. L. B. Wilson, Inc., the proposed permittee under the order of July 14th, has made preparation to take over the operation and has expended funds with that intent. The Commission, by its order of September 21, 1960, has stayed the effectiveness of its order which would discontinue the service of Public Service Television, Inc., and inaugurate the service of L. B. Wilson, Inc., until fifteen days after this court acts on the motion to stay the order of July 14th. Therefore, since the changeover of operators has been stayed by the Commission action, the motion to this court for further stay is unnecessary and will be held in abeyance.

The following is being ordered in respect to the several matters now pending:

1. The motion of Public Service Television, Inc., to vacate the order of July 14th is held in abeyance.

2. The motion of Public Service Television, Inc., for a stay is held in abeyance.

3. The motion of Elzey Roberts to intervene as *amicus curiae* is granted.

4. The motion of the United States to intervene as *amicus curiae* is granted.

5. The motion of North Dade Video, Inc., to consolidate its appeal, No. 16089, with the other pending appeals for briefing and argument is granted.

6. The parties are directed to proceed forthwith, in accordance with the following schedule, to prepare the cases for presentation upon the merits of the actions taken, or proposed to be taken,

by the Commission in its order of July 14, 1960:

Counsel for all parties will report to the court on or before December 28, 1960, whether they have been able to agree upon a statement of the questions presented upon these appeals under the foregoing directions of the court. In the event of inability to agree upon a statement of the issues, each party may state in its brief its view of the questions presented. The court has been advised by the Commission that the record upon which its order of July 14th was premised will be forthwith filed with the Clerk of this court. Briefs on behalf of Public Service Television, Inc., and North Dade Video, Inc., will be filed on or before the 25th day after the record is filed. Briefs on behalf of L. B. Wilson, Inc., and the Commission will be filed on or before the 15th day after the briefs of Public Service Television, Inc., and North Dade Video, Inc., have been filed. Briefs on behalf of the United States, as *amicus curiae*, and on behalf of Elzey Roberts will be filed on or before the 15th day after the briefs of Public Service Television, Inc., and North Dade Video, Inc., have been filed. Reply briefs will be filed on or before the 10th day after the last of the foregoing briefs is filed.

All briefs may be filed in typewritten form, to be followed by printed briefs within ten days after such filing.

The Joint Appendix will be prepared and filed within 25 days after the last of the briefs-in-chief has been filed.

DANAHER, Circuit Judge, concurs in this Memorandum.

WASHINGTON, Circuit Judge, did not participate in the disposition of the motions.

Opinion on the merits—July 6, 1961.

Messrs. A. Harry Becker and Alexander Boskoff, Washington, D. C., for appellant in No. 16089.

Mr. J. Roger Wollenberg, Washington, D. C., with whom Mr. Andrew G. Haley, Washington, D. C., was on the brief, for Elzey Roberts, appellant in No. 16091 and *amicus curiae* in Nos. 13718, 14021 and 14170.

Mr. Max D. Paglin, Gen. Counsel, Federal Communications Commission, with whom Mr. John L. FitzGerald, Gen. Counsel, Federal Communications Commission, at the time the brief was filed, and Messrs. Joel Rosenbloom and James T. Brennan, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Daniel R. Ohlbaum, Asst. Gen. Counsel, Federal Communications Commission, also entered an appearance for appellee in Nos. 13718 and 13725.

Mr. Norman E. Jorgensen, Washington, D. C., with whom Messrs. William I. Denning, Washington, D. C., and A. G. Hardy, were on the brief, for intervenor Public Service Television, Inc., in Nos. 13718, 13725, 14021 and 14170.

Mr. Robert A. Marmet, Washington, D. C., with whom Messrs. Paul M. Segal and Edwin R. Schneider, Jr., Washington, D. C., were on the brief, for intervenor L. B. Wilson, Inc.

Mr. Lewis Bernstein, Atty., Dept. of Justice, of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for the United States of America, as *amicus curiae*.

Messrs. W. Wallace Kirkpatrick, Richard A. Solomon, and Henry Geller, Attys., Dept. of Justice, were on the brief for the United States of America, as *amicus curiae*.

Messrs. Paul A. Porter, G. Duane Vieth and James O. Juntilla, Washington, D. C., were on the brief for appellant in Nos. 13718, 14021 and 14170.

Mr. George Bunn, Washington, D. C., also entered an appearance for appellant in No. 13718.

Mr. L. Reed Miller, Washington, D. C., also entered an appearance for appellant in No. 14021.

Messrs. E. Smythe Gambrell and Harold L. Russell, Atlanta, Ga., were on the brief for appellant in No. 13725.

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

PRETTYMAN, Circuit Judge.

These are appeals from orders of the Federal Communications Commission. The controversy arose when mutually exclusive applications for a permit to construct a television station at Miami, Florida, were filed. An award was made to one of the applicants. It was appealed. While the appeals were pending substantially authoritative information came to the court indicating irregularity in the award. The court remanded the case for an evidentiary hearing on issues thus posed.[1] The Commission appointed a special master, who conducted extensive hearings and made findings, conclusions, and an initial decision. Exceptions being filed, the Commission held a hearing and entered a decision and order. It said, in part:

> "4. The Commission, after careful evaluation of the facts, is of the opinion that the misconduct of WKAT, Inc., North Dade Video, Inc., and Public Service Television, Inc., reflects so adversely upon their character as to demonstrate that they lack the qualifications to operate the station sought in this application. None of them was satisfied to be judged upon the record made in open hearing through the processes of adjudication specified by statute and grounded upon the principles of judicial fairplay; each of them sought to influence the results by factors unrelated to the merits of the case and not a part of the hearing record. Willingness thus to pervert the processes of administrative adjudication is convincing proof that the requisite character qualifications are lacking. Their misconduct is '* * * of such moment as * * * logically and rationally to give rise to the conclusion that the public interest, convenience, and necessity would not be served were * * *' [citing cases] the applications in question, or any of them, granted."

The Commission issued an order disqualifying the three applicants named in the foregoing quotation.

The Supreme Court approached this subject in the Hazel-Atlas case.[2] A patent was there involved. It had been obtained by fraud on the Patent Office and sustained by carrying the fraud through to the Court of Appeals. The fraud was the preparation and publication of a spurious article purporting to be an authentic opinion of an expert used as evidence. Mr. Justice Black, writing for the Court, had this to say:

> "This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Mercoid Corporation v. Mid-Continent Investment Co., 320 U.S. 661 [64 S.Ct. 268, 88 L.Ed. 376]; Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 [62 S.Ct. 402, 86 L.Ed. 363]. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." [3]

The Court set aside the judgment which had been entered twelve years earlier, recalled its twelve-year-old mandate, dis-

1. WKAT v. Federal Communications Comm'n, 103 U.S.App.D.C. 324, 258 F. 2d 418 (D.C.Cir.1958).

2. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

3. Id., 322 U.S. at page 246, 64 S.Ct. at page 1001.

missed the appeal, and issued a mandate to the trial court directing it to set aside its judgment upholding the patent and to reinstate its judgment against the patent. All of these were infringement suits. The Court wrote: "To grant full protection to the public against a patent obtained by fraud, that patent must be vacated."[4]

[3] In Root Refining Co. v. Universal Oil Products Co.,[5] Circuit Judge Morris A. Soper wrote:

> "The client who with evil intent employs such an agent [*i. e.*, one who attempts by personal influence to control a judge or jury or who holds himself out as able to do so] fares no better in the instant case. To him also the doors of the courts are closed. From the moment that he ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, he becomes a corrupter of the Government itself and is fortuniate if he loses no more than the rights he seeks to obtain."

This doctrine applies to the adjudicatory functions of an administrative agency. This is not a mere technicality. Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

[4] We do not have here an ordinary case of "unclean hands", in which counterbalancing considerations of public interest in the service involved might justify awards despite misbehavior.[6] This case concerns corrupt tampering with the adjudicatory process itself. No public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government, the Commission concluded. The order proposed to be adopted by the Commission is well within its authority, the breadth of which is well illustrated by the order approved in Massachusetts Bay Telecasters, et al. v. Federal Communications Comm'n.[7]

One of the original applicants, L. B. Wilson, Inc., was not involved in irregular activities. It was found qualified by the Commission, and the Commission directed that its application be granted, subject to the proviso that any license issued upon completion of the construction be for four months and no longer. This latter action by the Commission was for the purpose of resolving a difficult practical problem. The operator who was on the air was one of the applicants found unqualified; but a license to L. B. Wilson for a full term, without comparative consideration with any new applicants, would give Wilson a measure of advantage which, in view of all the surrounding circumstances, was deemed by the Commission to be unwise. We think the decision reached by the Commission was well within its authority and was a reasonable one. It was seeking to sustain the public interest in respect to continuing television service to the viewing public in the Miami area. Closing the station entirely was an alternative not required in the circumstances. Accordingly the course followed may be approved.

[5, 6] A procedural problem is presented which arises from the terms of

4. Id., 322 U.S. at page 251, 64 S.Ct. at page 1003.

5. 169 F.2d 514, 541 (3d Cir.1948), certiorari denied, Universal Oil Products Company v. William Whitman Company, 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed. 444 (1949).

6. See, for example, the discussion in Federal Communications Comm'n v. WOKO, 329 U.S. 223, 229, 67 S.Ct. 213, 91 L.Ed. 204 (1946).

7. 111 U.S.App.D.C. 144, 295 F.2d 131.

our remand. The question is whether we meant the Commission to enter orders, subject to review on appeal, or whether we meant the Commission to formulate the orders it deemed appropriate and then to report its recommendations to us. The latter is our view. In our remand order we specifically retained jurisdiction of the appeals. This was in accord with the intendment of the Act of December 29, 1950,[8] as amended August 28, 1958.[9] The second sentence of Section 7(c) of that Act[10] provides that an agency "shall file in the court" its findings and order upon a remand for the adducement of additional evidence. This obviously means, we think, that the case remains in the court during the remand and that the court should consider the new findings and order upon the filing thereof by the agency. We think this statute does not contemplate that the agency can moot an appeal during a remand and thus foreclose court consideration of its conclusions upon the additional evidence. Our views on various aspects of this phase of our problem have been stated in McClatchy Broadcasting Co. v. Federal Communications Comm'n.[11]

The original grant of award, which is the order brought here by the original appeals, will be set aside, and the case is remanded to the Commission for entry of the order it now proposes consequent to its findings after the adducement of the additional evidence upon the remand. If we were to treat the order of the Commission now before us (dated July 14, 1960) as a final order before us upon the appeal of North Dade Video, we would affirm it.

It is our understanding that the Commission contemplates consideration of other applications for the station, if any are offered, when the matter of a full-term license comes before it, and it will then follow whatever proceedings are appropriate under the circumstances at that time. Its decision then will of course be subject to review here upon appeal.

So ordered.

8. 64 Stat. 1129, 1130.

9. 72 Stat. 951.

10. 5 U.S.C.A. § 1037(c).

11. 99 U.S.App.D.C. 199, 203–204, 239 F.2d 19, 23–24 (1956), certiorari denied, 353 U.S. 918, 77 S.Ct. 664, 1 L.Ed.2d 665 (1957).

CALIFORNIA COMPANY, Appellant,

v.

Stewart L. UDALL, Secretary of the Interior, Appellee.

No. 16132.

United States Court of Appeals
District of Columbia Circuit.

Argued April 14, 1961.

Decided Aug. 10, 1961.

A lessee under the Mineral Leasing Act brought an action against the Secretary of the Interior for declaratory judgment and injunctive relief. The United States District Court for the District of Columbia, Leonard P. Walsh, J., 187 F.Supp. 445, rendered a judgment adverse to the lessee, and the lessee appealed. The Court of Appeals, Prettyman, Circuit Judge, held that the Secretary of the Interior did not abuse his discretion in defining the phrase "value of production" in the provision of the Mineral Leasing Act that lease shall be conditioned on the payment by the lessee of a royalty of 12½ percent in amount or "value of production" removed or sold from the lease to mean gas conditioned for market, so as to require the lessee to pay royalties on the cost of conditioning gas for market.

Judgment affirmed.

EXHIBIT AA

Central of Georgia Railway Co. Control, 307 I.C.C. 39

FINANCE DOCKET No. 19159 [1]

CENTRAL OF GEORGIA RAILWAY COMPANY CONTROL

Decided November 14, 1958

Upon reconsideration:

1. Application of St. Louis-San Francisco Railway Company for authority to acquire control of the Central of Georgia Railway Company, through ownership of its capital stock, and, by virtue of such stock ownership, indirect control of its common-carrier subsidiaries, denied. Prior report, 295 I. C. C. 563.
2. Control of the Central of Georgia Railway Company by the St. Louis-San Francisco Railway Company found to have been accomplished and to be continuing in violation of the provisions of section 5 (4) of the Interstate Commerce Act, and respondent ordered to terminate such violation.

Appearances as shown in previous report and, in addition, *Everette Kreeger* and *Walter R. McDonald* for the Georgia Public Service Commission, and *Frank F. Vesper*, *Aaron Kravitch*, *Phyllis Kravitch*, *A. R. Neiman*, and *Leo H. Pou* for interveners.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By its report in these proceedings, dated July 9, 1957, 295 I. C. C. 563, division 4, (1) pursuant to application filed December 6, 1955, under section 5 (2) of the Interstate Commerce Act, approved the acquisition by the St. Louis-San Francisco Railway Company, hereinafter referred to as the Frisco, of control of the Central of Georgia Railway Company, hereinafter referred to as the Central, through ownership of a majority of the latter's capital stock, and, by virtue of such stock ownership, indirect control of the Central's common-carrier subsidiaries; [2] (2) found that it would not be in the public interest to grant requests of the Illinois Central Railroad Company hereinafter referred to as the Illinois Central, and the Seaboard Air Line Railroad Company hereinafter referred to as the Seaboard, to be included in the foregoing control transaction on an equal basis with the Frisco; and (3) in Docket No. 31977, found that control of the Central by the Frisco had been effected in violation of the provisions of section 5 (4) of the act, but, in view of the finding

[1] This report also embraces docket No. 31977, Central of Georgia Railway Company Investigation of Control.

[2] Central of Georgia Motor Transport Company, Louisville and Wadley Railroad Company, Ocean Steamship Company of Savannah, Wadley Southern Railway Company, Wrightsville and Tennille Railroad Company, South Western Railroad Company, and Savannah & Atlanta Railway Company.

in the application proceeding, that it was not necessary to determine whether the violation was continuing. The Frisco, the Central, and the other railroads mentioned in this report are common carriers by railroad subject to the provisions of part I of the act.

The approval in the prior report was made subject to specific conditions for the protection of employees and minority stockholders and the maintenance of existing routes and channels of trade, and entry of an order was deferred pending the receipt of notification of the acceptance by the Frisco of the prescribed conditions. On July 25, 1957, the Frisco filed such notification. On and after August 15, 1957, petitions for reconsideration, reargument, rehearing, and modification of the decision of division 4 were filed by certain interveners.[3] In view of the petitions, no order has yet been entered. Replies to the petitions were filed by the Atlantic Coast Line Railroad Company, the Central, the Frisco, the Alabama and Georgia public service commissions, and jointly by the Southern Railway Company and the Georgia Southern and Florida Railway Company; and the matter was orally argued before us.

The petitions generally disagree with conclusions of division 4 regarding (1) Frisco's violation of the provisions of section 5 (4) in acquiring without our authorization sufficient of Central's stock to become vested with the power to control that carrier; (2) the granting of Frisco's application to acquire sole control of the Central; (3) the refusal to grant the requests of the Illinois Central and the Seaboard to be included in the approved transaction; (4) the adequacy of the prices prescribed to be offered for further purchases of Central's stock; and (5) the sufficiency of the conditions prescribed to assure perpetuation of existing channels of trade. In view of the importance of the subject matter and the various issues raised, we are of the view that reconsideration is warranted, and the requests therefor are granted.

A statement of Frisco's proposal, financial data, and descriptions of it and the Central and the positions of the various parties and the evidence presented in support thereof or in opposition thereto, are set forth in the prior report and will be restated only to the extent necessary for clarity.

The Frisco contends that its control of the Central would give greater assurance of the latter's successful operation and provide an improved service between the West and Southwest, on the one hand, and the Southeast, on the other. It asserts that among the benefits which would result from the coordination of their operations, which would be made possible by approval of the transaction, are more

[3] The Gulf, Mobile and Ohio Railroad Company; Sol G. Salomon, Carrie D. Salomon, and Edward F. Quirk; Victor A. Altman; the Illinois Central; and the Seaboard, and the Macon, Dublin & Savannah Railroad Company.

effective use of diesel power, freight cars, and special equipment; provisions for blocking or grouping cars at Memphis, Tenn., and other points for movement through Birmingham, Ala., with little or no intermediate switching; improved car tracing and diversion services for shippers; the exchange between the Frisco and the Central of specialists with particular skills; benefits to employees resulting from stability of management; and improvements in methods of handling freight rate adjustments and general traffic matters.

Division 4 found, and we agree, that the evidence lends support to Frisco's claims in the foregoing respects. However, we are of the view that many of the improvements in service which it is stated would result from the acquisition of control could, and should, be effected through cooperative efforts between the two railroads under independent managements. Moreover, if independent of the Frisco, the Central will be in a better position to secure the cooperation of other connecting lines, particularly the Illinois Central, in effecting similar improvements in service with respect to traffic interchanged with those lines. Under Frisco's control of the Central, it is probable that joint-line service between the Central and the Illinois Central would deteriorate to some extent, and that some traffic would be diverted from the Illinois Central to its detriment.

If consideration were limited to the factors mentioned above, we might be persuaded to affirm the findings of division 4 and grant the authority requested, notwithstanding certain unfavorable aspects of the transaction which have been mentioned. However, there are other factors which weigh heavily against approval, and which, in our opinion, require denial of the application. First, the record is not convincing that the Frisco is able, without impairment of its working capital and credit, to meet the financial burdens incident to acquisition of other publicly held stock which may be offered to it under the terms of the condition imposed by division 4, which condition we deem appropriate in event the transaction were approved. Secondly, as found by division 4, and herein affirmed by us, control of the Central heretofore has been acquired by the Frisco in violation of the provisions of section 5 (4).

Certain facts concerning Frisco's acquisition of Central's stock are stated in the division's report. The Frisco began acquiring such stock in 1954, and by December 31 of that year it had acquired about 6 percent of the stock outstanding. From time to time thereafter, the Frisco purchased additional shares. On April 30, 1955, it owned 128,096 shares and on December 31, 1955, 252,633 shares, or 50.73 percent of the total shares outstanding in the hands of the public. The Frisco points out that in addition to the shares outstanding in the hands of the general public, the Central holds certain other

shares in trust for holders of unpresented bonds and voting trust certificates issued in connection with its reorganization. It contends that the question as to whether that stock can be voted is uncertain and that if it were included as outstanding stock the percentage of shares held by the Frisco on the last-mentioned date would be only 49.76 percent. We perceive no merit in this line of argument. Aside from the fact that, so far as this record shows, the indicated trust stock held by the Central has never been voted, considering the distribution of the outstanding stock, it is obvious that, whether the Frisco owned 49.76 or 50.73 percent, it had at that time the power to control the Central. The 252,633 shares owned by the Frisco on December 31, 1955, was equal to more than 66 percent of the total number of shares voted at the 1955 annual meeting of stockholders. It is well settled that control of a company does not require a numerical majority of shares having voting rights. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Atlas Corp. Application Under Panama Canal Act*, 248 I. C. C. 373.

In January and February 1956, the Frisco increased its holdings of Central stock to 253,189 shares; and, apparently in recognition that it was in violation of section 5 (4), on March 17, 1956, the Frisco entered into an agreement with Fred B. Wilson, of Duluth, Ga., under which the stock of the Central then owned or subsequently acquired by the Frisco was transferred to him in trust for certain purposes, including a duty to vote the trusteed stock pursuant to his sole discretion and best judgment to insure the entire independence of Central's board of directors and management. The agreement provides that Wilson shall be entitled to reasonable compensation, but the amount is not specified. The record does not show that Wilson had any prior experience in railroad or transportation activities.

At the annual meeting of Central's stockholders in April 1956, the power of Frisco's trustee to vote the stock was questioned and the meeting was adjourned to a later date without electing a new board of directors. Just prior to this meeting, however, the board elected Frisco's trustee to fill a vacancy in its membership and, with this exception, the record does not show that there has been any change in the board's membership since the 1955 meeting.

Prior to the execution of the trust agreement, the trustee was practically unknown to the Frisco's officers and directors, and he was appointed upon the recommendation of A. W. Ledbetter, chairman of the Central's board of directors. The record shows that there are close business and personal relations between Ledbetter and Frisco's president, and Ledbetter cooperated with the Frisco in acquiring stock control of the Central by selling it stock owned by him and by the Central's subsidiary, Ocean Steamship Company, and by

suggesting to other members of the Central's board of directors that they do likewise, at a time when he could not help knowing that the shares thus acquired would give the Frisco close to, if not actual, numerical majority of the shares outstanding.

Section 5 (5) of the act provides that, for the purposes of this section, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers if such transaction is by a carrier or by a person affiliated with it, and the effect thereof is to place such carrier and persons affiliated with it, taken together, in control of another carrier. Section 5 (6) provides that a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier, it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier. This definition of affiliation does not necessarily mean that the carrier of which control may be acquired will be managed solely, or even principally, in the interest of the other carrier, or that such management necessarily implies harm or detriment thereto; it means managed in the interest of such other carrier in any material degree. *Commercial Transport Corp.—Control—Commercial*, 65 M. C. C. 127, 153.

Considering the terms of the trust agreement, the circumstances leading up to Wilson's appointment as trustee, and his inexperience in railroad matters, it is not reasonable to believe that he will act free from the control or influence of the Frisco, the beneficial owner of the stock. We are of the opinion, and find, that Wilson is affiliated with the Frisco within the meaning of section 5 (6), and that transfer of the Central stock to him has not operated to terminate the control of the Central unlawfully acquired by the Frisco.

Most of the petitioners contend that, if we find that the Frisco has acquired control of the Central without our authorization in violation of section 5 (4), we may not lawfully authorize acquisition of control under section 5 (2). We agree with division 4 that such violation is not necessarily a bar to approval of an application under section 5 (2), if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval. In our opinion, such is not the case here. The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law. If the Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute; i. e.,

that we pass upon "proposed" acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated. Here, the Frisco not only acquired a majority of the Central's outstanding voting stock without our authorization, expending a large sum of money therefor, but it continued to purchase additional shares even after entry of division 4's order of April 12, 1956, instituting an investigation to determine whether or not the Frisco was in violation of section 5 (4), and subsequently after service of an examiner's proposed report recommending that we find that control of the Central by the Frisco had been accomplished and was continuing in violation of such section.[4] We are unable to accept the Frisco's profession of good faith in the premises. It has been subject to regulation by us for many years, and its officers and counsel knew or should have known of the requirements of section 5.

Upon consideration of all the facts, we are of the opinion that it would not be consistent with the public interest to grant the authority requested and, thus indirectly to sanction the violation of section 5 disclosed by this record. (Compare *Detroit & C. Nav. Co.—Control—Denver-Chicago Trucking*, 58 M. C. C. 599; *Welch—Control—Montreal-New York Exp.*, 56 M. C. C. 505.) Pursuant to section 12 (1) of the act, we are referring this matter to the United States attorney with request that prosecution be undertaken under the penal provisions of the act.

Paragraph (7) of section 5 provides that if, as result of an investigation instituted thereunder, we find that any person is violating the provisions of paragraph (4), we shall by order require such person to take such action as may be necessary, in our opinion, to prevent continuance of such violation. We are conscious of the fact that if the Frisco were required immediately to sell all of its interest in Central's stock, this, no doubt, not only would cause large monetary loss to the Frisco, with adverse effect upon its credit, but also would adversely affect the market prices of the stock and would be injurious to other, innocent stockholders of the Central. Accordingly, while our order will require that the Frisco terminate the violation and divest itself of power to vote the stock in the selection of Central's board of directors, or otherwise except as may be approved by us, the terms thereof will permit the Frisco to retain its beneficial interest in the stock owned by it, provided the legal title

[4] The Frisco's counsel stated at the oral argument held on the petitions for reconsideration that it then owned about 70 percent of the Central's stock.

of the stock is transferred to an independent corporate trustee or trustees, and subject to such terms and conditions, as may be approved by us. If the Frisco elects to follow this course, it will be expected promptly to submit for our approval a proposed trust agreement and a nominee or nominees to serve as trustee or trustees.

In view of the foregoing conclusions, it is unnecessary to discuss other contentions of the petitioners.

We find, in Finance Docket No. 19159, that it has not been shown that the transaction proposed would be consistent with the public interest, and that the application should be denied.

We further find, in docket No. 31977, (1) that respondent St. Louis-San Francisco Railway Company has acquired control of the Central of Georgia Railway Company through ownership of its capital stock, and that such control is continuing, in violation of the provisions of section 5 (4) of the Interstate Commerce Act, and (2) that the aforesaid respondent should be ordered to terminate such violation by disposing of all interest it may have in the capital stock of Central of Georgia Railway Company, or by transferring such stock to a trustee or trustees as hereinabove set forth.

We shall retain jurisdiction in docket No. 31977 to enter such further order or orders as may be necessary or appropriate to carry out the terms of our accompanying order and to assure compliance therewith.

An appropriate order will be entered.

FREAS, *Chairman*, WINCHELL, *Commissioner*, *and* MCPHERSON, *Commissioner*, dissenting in part:

We concur in the majority finding that control of the Central by the Frisco has been accomplished in violation of the provisions of section 5 (4). We also agree that the matter should be referred to the United States Attorney with a request that prosecution be undertaken.

We do not agree, however, that the application for control of the Central by the Frisco should be denied. In our opinion, the record is clear that the public interest would best be served by the operational efficiencies and economies which would result from single control of the Central by the Frisco. The indicated benefits to the public which would flow therefrom outweigh, we believe, the considerations for barring the Frisco from control because of the indicated violations. CHAIRMAN FREAS and COMMISSIONER WINCHELL would not impose the condition requiring the purchase of stock outstanding in the hands of the public. COMMISSIONER MCPHERSON would impose such a condition, but believes that there is nothing on this record to show that it would be unduly burdensome.

Finally, any contention that we "sanction" Frisco's conduct is sufficiently met by pointing out that we are unanimous in our decision to prosecute.

COMMISSIONER ARPAIA was necessarily absent and did not participate in the disposition of this proceeding.

COMMISSIONER WEBB did not participate in the disposition of this proceeding.

EXHIBIT BB

***Red Ball Motor Freight, Inc., Extension-California*, 128 M.C.C. 77**

No. MC-2229 (Sub-No. 180)[1]

RED BALL MOTOR FREIGHT, INC., EXTENSION—CALIFORNIA

Decided August 5, 1977

1. In No. MC-2229 (Sub-No. 180), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, of general commodities (with exceptions) over 20 described regular routes in Texas, New Mexico, Arizona, California, and Nevada, subject to a restriction. Issuance of a limited-term certificate, including a condition which requires applicant to file a detailed annual "Performance Report" describing its service rendered from and to specified points, approved upon compliance by applicant with certain conditions, and application in all other respects denied.
2. In No. MC-42487 (Sub-No. 817), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, of general commodities (with exceptions), over a regular route between Denver, Colo., and Fort Worth, Tex., as an alternate route for operating convenience only in connection with applicant's authorized regular-route operations. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.
3. In No. MC-8948 (Sub-No. 104), public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, of general commodities (with exceptions) over regular routes, (1) between Dallas, Tex., and New Orleans, La., and (2) between Houston, Tex., and Baton Rouge, La., subject to a restriction. Application denied.

Thomas E. Acey, Jr., Mark J. Andrews, John M. Ballenger, Robert R. Brinker, Richard Brown, William C. Evans, Carl H. Fritze, William F. King, Eugene T. Liipfert, L. C. Major, Jr., Joseph Lloyd Manson III, Ronald B. Natalie, Stuart F. Pierson, Theodore W. Russell, Russell R. Sage, and *R. Y. Schureman* for applicants and for certain applicants as protestants to other applications.

Paul D. Angenend, Robert J. Birnbaum, Richard H. Champlin, J. Raymond Chesney, Robert H. Cleveland, Morris G. Cobb, Jack L. Coke, James W. Conner, James M. Doherty, David F. Eshelman, Dan Felts, Grady L. Fox, Wentworth E. Griffin, John C. Holloway,

[1]This report also embraces No. MC-8948 (Sub-No. 104), Western Gillette, Inc., Extension—Louisiana, and No. MC-42487 (Sub-No. 817), Consolidated Freightways Corporation of Delaware Extension—Three States.

Joseph L. Howard, Jr., Alfred G. Krebs, Wayland Little, Timothy Mashburn, Robert N. Maxwell, John R. Murphy, Jr., Ewell H. Muse, Jr., Wallace H. Nations, Jerry Prestridge, Lloyd M. Roach, Phillip Robinson, William Slabaugh, Don A. Smith, James Smith, John MacDonald Smith, Mert Starnes, Frank W. Taylor, Jr., William F. Taylor, E. Larry Wells, and *Lawrence A. Winkle* for protestants.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GRESHAM, AND MACFARLAND

MURPHY, *Commissioner:*

These proceedings involve three applications by three regular-route common carriers of general commodities attempting to make major extensions of their operating rights. Each application, if granted, would enable the applicant to provide a direct-line service over regular routes stretching between points in certain Western States (primarily California, Arizona, New Mexico, and west Texas) and points in States along the Gulf of Mexico (east Texas, Louisiana, Mississippi, and Alabama). The authority sought by each applicant is fully set forth in appendix A. Numerous motor common carriers oppose the applications and their identities, and the application or applications they oppose, are summarized in appendix B.

These applications were heard separately by Joint Board Number 32 (the Western Gillette proceeding) and by two Administrative Law Judges. Because they involve similar extensions of authority, relate to traffic moving between the same general areas, are supported by many of the same shippers, and because a number of protestants oppose two or all three of the applications, they have been consolidated and will be disposed of in a single report. We will elaborate further on our reasons for consolidation when we deal with the motion to consolidate under the heading "Preliminary Matters."

The joint board denied the Western Gillette application, the Red Ball application was granted virtually in its entirety, with the provision that a limited-term certificate should be issued and annual performance reports required, and the Consolidated Freightways (CF) application was granted in part and denied in part. (Essentially, in the Consolidated Freightways application, a need was found to serve only the four Louisiana points sought, Jackson, Miss., and Mobile, Ala., and applicant was permitted to shorten its points in certain respects. The proposed restriction was modified and the authority to serve the three Texas points was denied.) Exceptions

were filed by numerous protestants in the Red Ball proceeding, by applicant in the Western Gillette proceeding, and by both applicant and protestants in the Consolidated Freightways proceeding. The arguments made by the exceptants and replicants are summarized in appendix C.

The evidence, the joint board's and the Administrative Law Judges' recommendations, the exceptions, and the replies have been considered. We find the joint board's and the Administrative Law Judges' statements of facts to be substantially correct and, as modified and supplemented herein, we adopt such statements as our own. Pertinent facts will be restated to the extent necessary for clarity of discussion. Our conclusions differ to some extent from those recommended.

PRELIMINARY MATTERS

Petition for consolidation.—Central Freight, Saia, ETMF, Braswell, Lee Way, Merchants Fast, ICX, Transcon, and Herder filed a joint petition seeking to have these three proceedings consolidated. They argue that the applicants seek largely overlapping authority; that the Administrative Law Judges and the joint board reached inconsistent conclusions based on similar or identical evidence; that it is burdensome on protestants to continue to oppose each application separately, and that to produce a consistent result, dispel confusion, and take into account the fact that there are three applications seeking similar authority, the Commission should consolidate these three proceedings. Western Gillette filed a reply to the petition supporting the request for consolidation, Red Ball filed a reply strongly opposing consolidation, and embraced in CF's reply to exceptions is its response to the petition conditionally favoring consolidation. Because we have determined, as stated earlier, that consolidation is warranted, the petition for consolidation will be granted. Comment is required, however, concerning CF's conditional response. CF argues that if the Commission should decide to grant only one or two of the applications, it should give all parties an opportunity to brief the issue as to which of the applications should be granted. It contends that failure to allow it to brief this issue would be procedurally unfair, and it cites the principle that the Commission may not "give consideration to evidence contained in the record" in other proceedings, cf. *Coastal Tank Lines, Inc., Ext.—W. Va.*, 108 M.C.C. 190, 194 (1968), in support of its position. We note initially

that allowing the parties to submit additional pleadings on the issue of which of these applications should be granted will cause substantial further delay in what are already quite protracted proceedings. We also believe we can make the required determination without benefit of briefs from the parties. Additionally, CF's claim as to lack of procedural fairness is meritless, as it was aware of all three proceedings, and of the petition for consolidation, and had ample opportunity to compare the relative merits of the applications and advocate that its application is the strongest. Finally, the *Coastal* case is inapposite as it dealt with a situation where a transcript of shipper testimony from one proceeding was introduced to support an applicant for operating rights in a second proceeding. Here all the evidence of record is before us and we may consider whatever data is necessary in order to reach a conclusion as to which, if any, of these applications should be granted.

Administrative Law Judge's censure of Merchants, Braswell, and ETMF in No. MC-2229 (Sub-No. 180).—In the Red Ball proceeding, the Administrative Law Judge censured protestants Merchants, Braswell, and ETMF for assertedly putting pressure on certain supporting shipper witnesses to withdraw their support for the application. He relied on the Commission's conclusion in *General Rules of Practice—Rule 247*, 120 M.C.C. 670, 682 (1974), and the Commission's policy statement of December 9, 1974, both of which strongly condemn the practice. Merchants separately, and ETMF and Braswell, jointly, filed exceptions to the Administrative Law Judge's censure. Merchants asks the Commission to clarify what is meant by "censure," disputes the impropriety of its conduct vis-a-vis the supporting witnesses, and questions whether applicant acted properly in the first place in securing shipper support. It also makes an alternative motion to reopen the proceeding for further hearing "if censure of Merchants is considered by the Commission." Braswell and ETMF aver that the actions of their representatives regarding the shipper witnesses they approached did not amount to coercion or intimidation but should be more accurately characterized as solicitation efforts. They argue that it was the shipper witnesses' subjective appraisal that led them to believe that pressure was being placed on them to withdraw their support for the application. They move for a limited reopening of the proceeding to receive affidavits by their officials attesting to their policy regarding approaching shipper witnesses supporting applications they oppose and specifically describing their activity concerning shipper

witnesses in this application. Braswell and ETMF also request, in the event they are censured by the Commission, that the proceeding be reopened for further oral hearing on the question of their conduct.

The evidence clearly indicates that representatives of Merchants, ETMF, and Braswell made a number of visits to certain witnesses supporting the Red Ball application which can only be interpreted as efforts to dissuade these witnesses from appearing at the hearing in support of Red Ball's proposal. The conclusions of the Administrative Law Judge, who observed the demeanor of the witnesses testifying as to the actions of Merchants, Braswell, and ETMF, are entitled to great weight and we further note that none of the protestants introduced evidence at the hearing directly refuting the accusations of the shipper witnesses. We believe that there is no question as to the impropriety of the conduct of protestants and no doubt that they were not engaged in solicitation of shipper witnesses, but were actively engaged in dissuading witnesses from testifying. For example, representatives of ETMF called on the witness for National Casein Co. five times and at one point told her:

*** the lawyers would tear me apart in a friendly way *** they would have flowers waiting on her when she finished testifying. [Red Ball Tr. 1674.]

This represents a fairly strong example of the conduct of protestants, but the other incidents cited by the Administrative Law Judge are only slightly less reprehensible. We reiterate the admonitions made in *General Rules of Practice—Rule 247, supra*, and our policy statement of November 9, 1974, where we strongly denounced the practice of protestants using information contained in certificates of support to attempt to persuade shippers to withdraw their support for an application. We again remind protestants that a deliberate effort to influence a witness not to testify may fall within the provisions of 18 U.S.C. Sec. 1505, and subject the offender to fine or imprisonment. We further call attention to Canon 24 of the Code of Ethics for Practitioners requiring practitioners before the Commission to restrain their clients from improprieties. We also conclude that "censure" of Merchants, Braswell, and ETMF is appropriate. By censuring protestants, we register our strong disapproval for their actions but do not take any official action against them. Further misdeeds of the kind described here may, however, result in a finding that these

carriers are not fit to operate in accordance with the Interstate Commerce Act and the Commission's applicable rules and regulations. Compare *Sammons Trucking Ext.—Aberdeen, S. Dak.*, 124 M.C.C. 373, 389 (1976). We will deny ETMF and Braswell's motion to reopen the proceeding for the receipt of additional evidence in light of their failure to demonstrate why such evidence was not introduced at the hearing. We also deem it unnecessary to reopen the proceeding for further oral hearing concerning protestant's conduct as the record is sufficiently clear as to these matters. This motion will also be denied.

Administrative Law Judge's rejections of evidence of Mercury Freight Lines, Inc., in No. MC-2229 (Sub-No. 180).—The Administrative Law Judge rejected the evidence of Mercury Freight Lines, Inc., a connecting carrier that interlines with protestant ICX. (This was a reversal of his ruling at the hearing when such evidence was admitted.) He based his ruling on rule 247(d)(8) of the Commission's Special Rules of Practice (49 CFR 1100.247(d)(8)), precluding the introduction of evidence by a nonparty except in special circumstances. Although rule 247(d)(8) specifically allows "the presentation of evidence of service by bona fide connecting carriers through a duly qualified protestant," the Administrative Law Judge reasoned that the protest of ICX only stated generally that "[p]oints in this application which are not served direct by ICX are served by interchange with established connecting carriers at all authorized gateways," and did not indicate that ICX intended to present evidence through connecting carriers nor did it identify the connecting carriers involved. ICX excepted to this ruling.

We believe the evidence of Mercury was properly admitted. A protestant is not obligated to name specifically the carriers with which it interlines as long as it indicates that the service it will provide is in conjunction with connecting carriers. This is all that is required by section 247(d)(8). See *Jerry Lipps, Inc., Extension—Florida*, 108 M.C.C. 143, 145 (1968); and *Klipsch Hauling Co., Extension—Liquid Chemicals*, 119 M.C.C. 411, 420 (1970). Our conclusion is bolstered by the requirement that the Commission's Rules of Practice are to be liberally construed (rule 2, 49 CFR 1100.2) and the failure of Red Ball to show it was prejudiced by the introduction of the evidence. Accordingly, we have taken the evidence of Mercury into account in making our decision.

Request for oral argument.—Both the Central Freight exceptants in the Red Ball proceeding, and the Braswell exceptants in the

Consolidated Freightways proceeding, request oral argument before the Commission. We are of the opinion that oral argument is unnecessary and would unduly delay the proceeding, and the requests will be denied.

APPLICANTS

Red Ball is a common carrier of general commodities, operating over a network of regular routes in Alabama, Arkansas, Colorado, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. The area it serves is bounded by Kansas City on the north, Denver and Santa Fe on the west, Houston on the south, and Mobile on the east.[2] By this application, Red Ball seeks to extend its routes in the Gulf Coast States westward from Houston and Fort Worth to numerous points in Texas, New Mexico, Arizona, California, and Nevada including El Paso, Tex., Tucson and Phoenix, Ariz., Los Angeles and San Francisco, Calif., and Reno, Nev. The restriction in the authority sought would prevent Red Ball from handling traffic originating at and destined to points west of a line running north from Galveston, Tex., through Dallas, Little Rock, Memphis, and Chicago to the international boundary line between the United States and Canada. It would thus be unable to provide service, for example, between El Paso and San Francisco, but would be able to transport traffic between points in its presently authorized area and points in the Western States it seeks to serve herein. If this application is granted, Red Ball will establish terminals or agency stations at Reno, Nev., Nogales, Phoenix, Tucson, and Yuma, Ariz., Lordsburg, N. Mex., Abilene, El Paso, and Odessa, Tex., and at 12 points in California. Applicant is a fairly heavy participant in joint-line traffic moving between its present service area and the proposed service area. In May 1973, it interlined 5,941 shipments aggregating over 5.8 million pounds moving between the considered territories. Most of this traffic was interlined at Dallas, Houston, or Amarillo, Tex.

Red Ball proposes the following transit times, in workdays on both truckload and less-than-truckload shipments, between its presently authorized territory on the one hand, and, on the other, the following points it seeks to serve: El Paso, Tex., Las Cruces,

[2] In No. MC-2229 (Sub-No. 132), *Red Ball Motor Freight Inc., Extension—Atlanta, Ga.*, embraced in *Herrin Transp. Co. Extension—Atlanta, Ga.*, 114 M.C.C. 571 (1971), affirmed *sub nom. Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), applicant was granted authority over regular routes (1) between Atlanta, Ga., and Texarkana, Ark., (2) between Jackson, Miss., and Atlanta, and (3) between Meridian, Miss., and Tuscaloosa, Ala.

Deming, and Lordsburg, N. Mex., and Duncan, Bylas, Safford, Phoenix, Tempe, Tucson, and Nogales, Ariz.—3 days; Miami, Globe, and Yuma, Ariz., and Indio, San Diego, San Bernardino, and Los Angeles, Calif.—3 to 4 days; Bakersfield, Santa Barbara, San Luis Obispo, and Fresno, Calif.—4 days; Reno, Nev., and Salinas, Sacramento, and San Francisco, Calif.—4 to 5 days; and Bishop, Calif.—5 days. To support its transit time proposals, applicant introduced evidence of all the shipments it handled in May 1973 between Denver, Colo., and Memphis, Tenn. (a distance of 1,117 miles, the approximate distance between El Paso, Tex., and Baton Rouge, La.). It met its 3-workday standard on these shipments over 74 percent of the time.

Western Gillette transports general commodities over regular routes in Georgia, Alabama, Illinois, Missouri, Arkansas, Oklahoma, Texas, Arizona, California, Nevada, Mississippi, Tennessee, and New Mexico. As pertinent hereto, its routes extend eastward from San Francisco and Los Angeles through Arizona, New Mexico, and Texas to Houston and Dallas. The authorization of the service proposed herein would allow Western Gillette to extend its routes further eastward to New Orleans, Baton Rouge, Shreveport, and Bossier City, La., and intermediate points between New Orleans and Baton Rouge on U.S. Highway 61. It would be able to operate between points in the Western States it serves, on the one hand, and, on the other, the Louisiana points indicated above (the long-haul proposal), and also between Dallas, Fort Worth, and points in its regular routes in Oklahoma, on the one hand, and, on the other the Louisiana points (the short-haul proposal). As indicated in the authority sought, applicant would be restricted against handling traffic moving between Houston and the Louisiana points, and between points both of which are east of the western boundaries of Louisiana, Arkansas, Missouri, Iowa, and Minnesota. If the instant application is granted Western Gillette will establish terminals at New Orleans, Shreveport, and Baton Rouge.

Like Red Ball, Western Gillette is also a substantial participant as an interline carrier in traffic moving between points in the Western States, on the one hand, and, on the other, points in Louisiana. Its primary interchange points are at Dallas and Houston. Between February 1 and November 15, 1973, applicant handled 5,313 shipments weighing over 5.3 million pounds between its western service territory and the proposed Louisiana points. Applicant's proposed transit times in workdays between New Orleans, Baton Rouge, Shreveport, Bossier City, and the intermediate points

between New Orleans and Baton Rouge it seeks herein on the one hand, and, on the other, its principal terminal points in the Southwest are as follows: (1) Dallas and Fort Worth—overnight service from and to Shreveport and Bossier City, second morning service from and to New Orleans, Baton Rouge and the other Louisiana points, (2) Oklahoma City and Tulsa—second-day service, (3) El Paso—third-day service, (4) Tucson and Phoenix—fourth-day service, (5) San Diego, Los Angles, Blythe, and El Centro, Calif.—fifth-day service, and (6) Fresno, Stockton, Oakland, Lancaster, Bakersfield, Bishop, and San Jose, Calif.—sixth-day service.[3]

Consolidated Freightways is a motor common carrier of general commodities operating over a network of regular routes extending from the Atlantic to the Pacific Coast and from Alaska and Canada, on the north, to San Diego, Calif., Houston, Tex., Birmingham, Ala., and Columbia, S.C., on the south. Its objective in filing this application is to extend its routes from the Western States (Colorado, Utah, Wyoming, Montana, Idaho, Washington, Oregon, California, Nevada, and Arizona) and Alaska and Western Canada to three points in Texas (Beaumont, Port Arthur, and Orange),[4] four points in Louisiana (Lake Charles, Shreveport, Baton Rouge, and New Orleans) and Jackson, Miss., and Mobile, Ala.[5] A secondary objective herein, is to shorten applicant's routes between the Western States on the one hand, and, on the other, its presently authorized service points in Texas. Applicant's routes now extend from southern California and Arizona via Flagstaff, Ariz., Albuquerque, N. Mex., and Wichita, Kans., into Texas, and its routes from the Northwest extends through Denver and Wichita into Texas. The proposed shorter routes are sought primarily to achieve operating economies and efficiency, and CF argues that for the most part these new routes would not significantly enhance its competitive position. Applicant introduced evidence of traffic it handled in 1973 between terminals in the Western States (terminals are grouped together for convenience and clarity) and its five Texas

[3]It should be noted that Western Gillette considers its service standard fulfilled if it meets its proposed transit times plus 1 day 70 percent of the time.

[4]As noted earlier, authority to serve these three Texas cities was denied by the Administrative Law Judge, and no exceptions were filed to this aspect of the initial decision.

[5]Applicant's proposed restriction would have prevented it from providing service on shipments moving between points both of which lie east of the western boundaries of Louisiana, Arkansas, Missouri, Iowa, and Minnesota. The Administrative Law Judge in his grant authority modified the restriction to preclude the handling of shipments with both an origin and destination at points in or east of Texas. Oklahoma, Kansas, Nebraska, South Dakota, and North Dakota.

terminals (Dallas, Fort Worth, Houston, San Antonio, and Waco). The data demonstrates that CF transported over 42 million pounds of traffic between its Texas terminals and its Sacramento, Oakland, Los Angeles, and Phoenix terminal groups and almost 80 million pounds of traffic between the five Texas terminals and the remaining Western State terminal groups (Portland, Spokane, and Seattle, Wash., Great Falls, Mont., Salt Lake City, Cheyenne, Wyo., and Denver, Colo.). The mileage savings that would be effectuated by the shorter routes into Texas are indicated by the chart below.

	Dallas, Fort Worth, San Antonio, Waco	Houston
	Miles	
Denver	85	85
Los Angeles	316	430
Phoenix	816	930
Oakland	359	473

Applicant is seeking these shorter routes based not on an alternate-route theory but premised on an asserted public need for the proposed service coupled with the operating economies it hopes will be produced.

CF also submitted information regarding the traffic it handled in joint-line service moving between points in the Western States it serves, on the one hand, and, on the other, the new service points.[6] Annualized to cover the entire year of 1973, the data reflects over 35,800 shipments weighing in excess of 25.1 million pounds. Applicant states that if the six new service points are authorized, it will established a terminal at each of the points. CF offers these proposed transit times in calendar days between points it presently serves in the Western States and the six new service points in Louisiana, Mississippi, and Alabama, as well as its presently authorized Texas points.

[6]This includes traffic moving to or through the Texas points that were excluded from the grant of authority.

	Texas points and Lake Charles	New Orleans, Shreveport, Baton Rouge, Jackson, Mobile
	Days	
(1) Fairbanks and Anchorage, Alaska	9-10	10-11
(2) Seattle and Spokane, Wash., Portland, Eugene, and Klamath Falls, Oreg	5-6	6-7
(3) Salt Lake City, Utah, Boise, Idaho, and Great Falls, and Kalispell, Mont	4-5	5-6
(4) Denver, Colo., and Casper and Cheyenne, Wyo-	3-4	4-5
(5) Oakland, San Francisco, and San Jose, Calif	4-5	5-6
(6) Los Angeles, Orange, and San Diego, Calif	3-4	4-5

Subsequent to the close of the hearing in its case, for a 2-week period in April and May 1975, CF conducted an experiment to attempt to prove that its proposed transit times are feasible. It selected the traffic lane between Portland, on the one hand, and, on the other, Dallas and Houston, and instructed its personnel to expedite these shipments to whatever extent possible. Its average transit times for the shipments handled during the 2-week period was 4 days in contrast to the 6 days it presently holds out and the 5 to 6 days it proposes in this proceeding.

PUBLIC SUPPORT

We see no reason to repeat in any great detail the evidence of supporting shippers, receivers, and motor carriers in these three applications. Their voluminous evidence has been set forth in a thorough and complete manner by the Administrative Law Judges and the joint board. We will, however, mention some of the salient features of the supporting evidence.

The Red Ball application is supported by 232 shippers,[7] 6 motor common carriers, and the Port of New Orleans. The overwhelming majority of the traffic of these shippers moves between points in California, on the one hand, and, on the other, points in Texas, Louisiana, Mississippi, Alabama, and Arkansas. To a lesser extent their shipments are also being handled between the Gulf Coast States, on the one hand, and, on the other, Arizona, Nevada, New Mexico, and west Texas.

[7] It should be noted that a number of shippers support two or all three of the applications. The totals given for supporting shippers do not allow for duplication.

The Western Gillette application is supported by 112 shippers or receivers of freight, 3 connecting motor common carriers, and the Port of New Orleans. As far as the long-haul proposal is concerned, the predominant support is for traffic shipped between California and the proposed Louisiana points, and 68 of the supporting firms require service between these States. To a far lesser extent, some shippers express a need for service between the Louisiana points on the one hand, and, on the other, points in Arizona (primarily Phoenix and Tucson) and west Texas (primarily El Paso). A total of 57 shippers support applicant's short-haul proposal (some witnesses appeared in support of both proposals, *e.g.*, a Louisiana shipper with customers in Dallas, Tulsa, and Los Angeles).

In the Consolidated Freightways application, 202 shippers and 10 motor carriers appeared in support of the application and again, the prevailing support was for traffic shipped between California and the nine service points applicant seeks to serve in Texas, Louisiana, Alabama, and Mississippi. To a considerably smaller degree shippers asserted a need for traffic between those points, on the one hand, and, on the other, various points in Washington, Oregon, Nevada, Idaho, Montana, Utah, Wyoming, Colorado, and Arizona. A number of Western States (particularly California) and Texas firms appeared in support of CF proposal to establish shorter routes between the Western States and Texas.

The recurring theme running through virtually all the shipper testimony in support of the three applications is dissatisfaction with the transit times being provided by existing carriers and approval for the faster transit times proposed by the applicants. These complaints about transit times were expressed most frequently by the numerous shippers supporting applicants for authority between points in Louisiana, Alabama, and Mississippi, on the one hand, and, on the other, points in California, Nevada, Arizona, New Mexico, and west Texas. Shippers argued that the slow and inconsistent transit times they experienced on traffic moving between these groups of States caused customer dissatisfaction, made scheduled deliveries difficult, and otherwise hampered the conduct of their businesses. Many shippers introduced traffic studies of all or substantially all shipments moving within the scope of these applications for periods of time ranging generally from 1 month to 1 year. Some shippers' traffic studies included only those shipments which were delayed, and other shippers merely asserted generally that existing service between the points involved was too slow. The supporting witnesses complaining of transit times generally cited

either the single-line service of Braswell as deficient or the various joint-line combinations operating between the Western States and the Gulf Coast States.

In addition to assertions regarding unsatisfactory transit times, witnesses appearing on behalf of applicants also complained of problems with joint-line service, particularly excessive handling, causing loss and damage, and tracing difficulties. Some firms expressed the belief that single-line service is inherently superior to joint-line service and gave this as their primary reason for supporting the proposed operations. A minority of shippers (particularly in the Western Gillette proceeding) criticized protestants for late and missed pickups.

The representative of the Port of New Orleans asserted that there was a lack of sufficient single-line motor carrier service between New Orleans and the Western States. He contrasted the situation in New Orleans, where only one motor carrier could provide direct service to the west coast (Braswell), with the nearby competitive port of Houston, which had six trucking companies able to operate on a single-line basis to the western part of the United States. He believed that the authorization of additional motor carriers will help remedy this deficiency.

PROTESTANTS

As we indicated with the testimony of supporting firms, we find no logic in repeating the evidence of the opposing carriers whose interests have been amply set forth in the three initial decisions. In appendix D, however, we will set forth the pertinent authority of each protestant in these proceedings, by what method (joint-line or single-line) they are providing service in conflict with the proposed service, and the periods of time protestants have selected to demonstrate their transit times (if any are given) on behalf of the shipping public. With one exception, all protestants are motor common carriers of general commodities over regular routes. We will also note at this juncture that many of the protestants sought to discount the likelihood of applicants' meeting their proposed transit times by demonstrating that applicants frequently do not meet the transit times they presently hold out, by discounting the significance of Red Ball's transit times between Denver and Memphis because breaking bulk at an intermediate point was not required, as it will be (at Dallas) in its proposed operation, by disparaging CF's experiment on traffic moving between Portland, on the one hand,

and, on the other, Dallas and Houston, because it was rigidly controlled and not reflective of overall service, and by reiterating that Western Gillette is only holding itself out to meet into transit times plus 1 day 70 percent of the time.

DISCUSSION AND CONCLUSIONS

In determining whether any or all of these applications for certificates of public convenience and necessity should be granted, we will adhere to the often-cited criteria established over 40 years ago: whether the proposed operations are responsive to a public demand or need, whether this need can be met as well by existing carriers, and whether authorization of the proposed service will impair the operations of existing carriers contrary to the public interest. *Pan-American Bus Lines Operation*, 1 M.C.C. 190 (1936).

We are faced in this proceeding with three motor carriers seeking overlapping but not identical extensions of their operating authority. Also involved are the support of approximately 500 shippers, the opposition of approximately 30 motor carriers, 3 separate hearing records, 3 initial decisions reaching somewhat (although not entirely) inconsistent results, and 3 sets of exceptions and replies. Having carefully examined the evidence, the pleadings, and the applicable precedents, we have concluded that the application of Red Ball should be granted virtually in its entirety, that the application of Consolidated Freightways should be denied except for one of the routes it seeks, and that the Western Gillette application should be denied in its entirety. We will next discuss our basis for these conclusions beginning first with the long-haul proposals of the three applicants which form the most significant aspect of this proceeding.

The long-haul proposals.—The overwhelming shipper support in this proceeding is to obtain a superior motor carrier service for the transportation of traffic moving between points in States along the Gulf of Mexico (Alabama, Mississippi, Louisiana, and east Texas) on the one hand, and, on the other, points in States located in the southwestern portion of the United States (primarily California, Arizona, New Mexico, Nevada, and west Texas). We believe that existing motor carrier service between these areas is inadequate and we uphold the conclusions of the Administrative Law Judges in the Red Ball proceeding and in the CF proceeding to this extent. We disagree with the conclusion of the joint board in the Western Gillette proceeding that joint-line service between these areas is

adequate although we agree with its subsidiary conclusion about the inadequacy of the single-line service of Braswell. The evidence of firms supporting the three applications indicates that both single-line and joint-line service between these areas has been inadequate to meet the reasonable needs of the shipping public. This inadequacy is reflected in excessive and inconsistent transit times that have interfered with the efficiency of the business of the supporting shippers. As the Commission stated in *Braswell Freight Lines, Inc., Extension—Atlanta,* 100 M.C.C. 482, 501 affirmed *sub nom. United States* v. *Dixie Express,* 389 U.S. 409 (1967):

> We believe that the shipping and receiving public is entitled to consistent scheduled transportation service so that the arrival and departure times of their shipments can be predicted with reasonable certainty. Otherwise, such vital matters affecting the conduct and sales promotion of their businesses as maintenance of production schedules, control of limited inventories, ability to purchase at markets affording quality merchandise at reasonable prices and from which adequate service is available, accommodating customer requirements for timed deliveries, and taking advantage of short term discounts and payment after arrival of goods must suffer.

We realize that not all the shippers introduced evidence that was persuasive as to inconsistent and lengthy transit times. Some firms only cited the shipments that were delayed, and other merely asserted that transit times were too long or argued that single-line service is inherently faster than joint-line service. Additionally not all shippers tried every available joint-line combination to move their traffic and some shippers did not control their traffic being transported within the scope of this application. But we believe that the supporting evidence, taken as a whole, conclusively demonstrates the slow transit times provided by existing carriers, and we do not agree that it is necessary that every shipper try every conceivable joint-line service available as long as a substantial number of the supporting shippers made investigations of and reasonable efforts to use most of the available services, as was the case here. See also *Herrin Transp. Co. Extension—Atlanta, Ga., supra,* at page 600.

Some of the major protestants introduced their own transit time studies attempting to refute the allegations of inadequacy of the supporting shippers and to show that their service is meeting the reasonable needs of the shipping public. Several of these studies concerned only the protestant's portion of the joint-line movement rather than indicating the transit times for the entire movement from origin to destination. It is of little probative value that a firm's

shipments moved expeditiously to a point of interchange, if we are not told what period of time transpired until the shipment was finally delivered. Moreover, when transit times for the entire movement are given (*e.g.*, New Orleans to Los Angeles) the time periods reflected are frequently short and almost always shorter than the time periods chosen by supporting shippers to validate their claims. In light of the selectivity of protestants' transit time studies, and the longer periods of time selected by the supporting firms, we are inclined to give greater credibility to the latter's allegation of slow service. See *Milne Truck Lines, Inc., Ext.—San Francisco,* 121 M.C.C. 149, 163 (1975). Therefore, our conclusions as to the poor transit times of existing joint-line and single-line service are not altered by protestants' transit time studies.

We are of the opinion that the authorization of one additional carrier able to provide single-line service between the involved Gulf Coast and Western States areas is required by the public convenience and necessity. The evidence in this proceeding shows that the shipping public requires a single-line service between the areas invovled to provide faster transit times and to help remedy the deficiencies brought about by existing service. *Roadway Exp., Inc., Ex.—Birmingham, Dallas, Houston,* 82 M.C.C. 689, 701 (1960). Braswell, virtually the only carrier able to provide single-line service between the Gulf Coast States area, on the one hand, and, on the other, points in the Western States (although its service in California is limited to the southern portion of the State) filed for bankruptcy under Chapter 11 of the Bankruptcy Act on December 2, 1976. The possible loss of this single-line service, deficient though it may be, further justifies our conclusion that an additional single-line service is needed by the shipping public.

A number of protestants have questioned whether any of the three applicants will be able to meet their proposed transit times and provide faster service than existing carriers are now providing. If applicants are unable to provide an improved service, they contend, their authorization will not have any effect on correcting the deficiencies in service the supporting shippers have complained about. Protestants have pointed out the failure of all the applicants to meet consistently the transit times they presently hold out, and they disparage the data of Red Ball and CF designed to show that they are capable of meeting their service proposals herein because the data does not accurately reflect the true situation on the proposed routes. We are of the opinion that all of the applicants are capable of meetng their proposed transit times in this proceeding.

Applicants are large, experienced carriers with well thought out operating proposals and they have not suggested transit times that are so swift as to be unrealistic. Although applicants may have fallen short of their transit times they hold out on their present routes, the Supreme Court in *Bowman Transp.* v. *Arkansas-Best Freight System, supra,* held that performance by applicants on other routes was of little relevance to how they would perform on proposed routes. It is not essential that an applicant prove to an absolute degree of certainty that it will meet its proposed standards for transit times and we may conclude, as we do here, that authorization of single-line service in lieu of joint-line service will give an applicant the incentive and the ability to improve upon its prior performance. Moreover, our grant of authority herein will provide for the issuance of a limited-term certificate and the submission of annual performance reports to enable us to determine if the promises of expeditious service will be fulfilled. This condition should further defuse the arguments that any or all of the applicants are making promises of service they will be unable to keep.

The Commission has observed in a prior proceeding that "[m]ultiple-application proceedings require care not only to avoid the proliferation of operating authorities not needed by the shipping public, but also the selection of carriers with the ability to perform the proposed service," *Motor Freight Corp. Ext.—Pottawattamie County, Iowa,* 106 M.C.C. 654, 657 (1968). Given the quantum of existing carriers presently providing service between the areas involved in this proceeding, and the volume of traffic moving between these areas, we conclude that only one of these three applications should be granted. The authorization of two or all three of the applicants would have a significant adverse effect on the operations of existing carriers and a counterproductive impact on the transportation services available to the shipping and receiving public. See *Herrin, supra,* at page 601. The Commission has formulated certain criteria to determine which application or applications should be granted in a proceeding where there are multiple applicants and only a limited need for service. These criteria include (1) an evaluation of the existing authorities and operations of the applicants, (2) the location of their terminal facilities, (3) the equipment applicants operate, (4) priority in filing the applications, and (5) the carrier which produced the evidence of the public need, *Kroblin Refrigerated Xpress, Inc., Ext.—Denison, Iowa,* 96 M.C.C. 233, 237-238 (1964). The latter two criteria are considered to be of relatively minor importance, cf. *Willis Shaw*

Frozen Exp., Inc., Ext.—Springdale, Ark., 96 M.C.C. 225, 230 (1964), and generally the Commission's major focus is on an analysis of the first three factors. However, these criteria are usually applied in proceedings where multiple applicants seek irregular-route authority to transport a specific commodity or commodities from a plantsite or origin point (*e.g.*, *Motor Freight Corp. Ext.—Pottawattamie County, Iowa, supra*, and *Best Truck Lines, Inc., Extension—Emporia*, 98 M.C.C. 202 (1965)) and where the operations of the applicants in the area of the supporting shipper's facility, the proximity of their terminals to the facility, and the suitability of the equipment they operate to handle the commodities involved are of crucial importance in determining which applicant or applicants are the appropriate ones to be authorized. We believe that these criteria are far more difficult to apply and far less appropriate in multiple applications involving regular-route extension of general commodity carriers. Although the Commission did utilize these criteria in the *Herrin* case, it had a situation before it with four southwestern carriers seeking to extend their routes to the Southeast, and four southeastern carriers attempting to extend their routes to the Southwest. It was far easier and more meaningful to compare the operations, terminals, and equipment of each set of four carriers in the territories in which they operated than it would be here where Red Ball, essentially a gulf coast carrier, is trying to expand westward, and CF and Western Gillette, which, as far as these applications are concerned, are western carriers, are seeking to expand to serve certain points in the gulf coast area. While we are not abandoning the *Kroblin* criteria in regular-route proceedings, we are of the opinion that there is a far more significant feature in this proceeding that establishes conclusively which one of these applications should be granted and we base our determination solely on this extremely important consideration.

In its application, Western Gillette has sought authority to serve the three most populated metropolitan areas in Louisiana: New Orleans, Baton Rouge, and Shreveport. In addition to these cities it asks only to serve the additional points of Bossier City (which is in the Shreveport commercial zone) and those points between New Orleans and Baton Rouge on U.S. Highway 61. CF similarly requests authority to serve New Orleans, Baton Rouge, and Shreveport and adds to those points, the fourth largest metropolitan area in Louisiana, Lake Charles. It also seeks to extend its routes to Jackson, Miss., the largest city in that State, and Mobile, Ala., the second largest city in Alabama. By contrast, Red Ball's application,

if granted, would add to its authorized service points over 900 cities and towns, both large and small, in the five Western States where it is seeking to extend its routes. The Commission has heretofore expressed its concern with motor carriers, which through traffic restrictions, refuse to handle traffic that must be picked up or delivered at small communities, particularly in rural areas. See *Restrictions on Service by Motor Common Carriers,* 111 M.C.C. 151 (1970). Of equal concern to us are carriers which simply do not want to serve small towns and apply for authority only to serve large cities and major traffic centers. This type of selectivity has a twofold adverse effect on the transportation service available to small communities. The most direct impact is by depriving the businesses in smaller localities of direct single-line service to transport their shipments and forcing them to rely on joint-line service. The large cities and urban areas thus have their shipping needs provided for, but the local communities are discriminated against in terms of obtaining the best transportation service. A less direct but no less harmful effect of such selectivity is the great burden it places on those carriers which presently serve both major and minor points. By diverting the traffic they handle from large metropolitan areas, and leaving them the less lucrative traffic from rural areas, these carriers' service to small localities must suffer as a result, and the quality and quantity of service to small localities will inevitably decline. We have recognized the problem this selectivity causes in other cases, cf. *Bowman Transp., Inc., Ext.—Jackson, Ala.,* 113 M.C.C. 633 (1971). Additionally the problems of out-of-the-way communities receving adequate transportation have been taken note of in a recent study where it was concluded "*** at least minimal transportation service must be provided to small towns if small towns are to contribute to the general welfare of the nation (as well as to themselves)."[8] We conclude that the Red Ball application should be granted because of Red Ball's proposal to serve communities of varying sizes and location, while the CF and Western Gillette applications (to the extent long-haul authority is sought) should be denied because of their request only to serve major metropolitan areas. We are not suggesting that future applications of regular-route general-commodity carriers will be denied unless authority is sought to serve a wide variety of points. Every application must stand or fall on its own merits and the evidence in each proceeding will dictate the outcome. But here,

[8]Vary Coates and Ernest Weiss, "Revitalization of Small Communities: Transportation Options," Volume 1, Part II, p. 62 (1975).

where we must choose between competing applicants for similar authority, we believe that Red Ball's service proposal is far superior to the proposals of CF and Western Gillette, and public convenience and necessity warrants the authorization of Red Ball's service. Although CF's routes extend to a number of Western States which Red Ball is not seeking to serve, the evidence in support of this portion of CF's application (i.e., between New Orleans, Baton Rouge, Shreveport, and Lake Charles, La., Jackson, Miss., and Mobile, Ala., on the one hand, and, on the other, points in Colorado, Utah, Wyoming, Montana, Idaho, Washington, Oregon, Alaska, and Western Canada) is not particularly substantial, and in light of the difficulty in restricting CF's authority only to serve points in these areas and because of the selectivity in its operating proposal, this portion of CF's application will also be denied.

In regard to the effect the granting of the Red Ball application will have on existing service, we do not perceive that any carrier (except perhaps Braswell which is already in the throes of bankruptcy) will be put of business or significantly harmed by the new competition. It is true that carriers providing joint-line service between the Western States and the gulf coast area will have some traffic diverted to Red Ball's single-line service, but there is no basis for concluding that this loss of traffic will seriously hamper their operations.

Consolidated Freightways proposal to shorten its routes.—Part of the intent of CF in filing its application is to shorten its present routes between points in California, Arizona, Nevada, and the Pacific Northwest, on the one hand, and, on the other, points in Texas. Its proposal to seek shorter routes between California, Arizona, and Nevada, on the one hand, and its present Texas service points, on the other, has met with great opposition and we will deal with that proposal first.[9] CF has premised its need for shorter routes on public support for the service. Approximately 73 firms located in California, Arizona, Nevada, and Texas supported the application so that CF could obtain the shorter routes in question. However, there is little or no evidence of any material inadequacy in the service presently being provided between the involved areas. Most of these shippers have expressed general satisfaction with existing service, and to the extent they are dissatisfied, their complaints are of a general nature lacking the specificity required to demonstrate that existing service is deficient. Five protestants in the CF proceeding,

[9]Both proposed routes (1) and (3), noted in appendix A, would accomplish the purpose of shortening CF's routes.

Transcon, Lee Way, ETMF, ICX, and Western Gillette have been providing single-line service over the traffic lanes in question. We believe that their service has been shown to be satisfactory and that the evidence of public need does not justify authorization of a new competitor. We are also skeptical that CF will be able to provide an improved service by meeting its proposed transit times over these routes. Unlike the situation involving service to the Gulf Coast States, where applicants are proposing to substitute single-line for joint-line service, CF here is merely seeking to compete with existing single-line operations. The likelihood of a single-line service producing more expeditious transit times than joint-line service is far greater than the likelihood of one single-line service bettering the times provided by other single-line services based largely on speculative promises, and in light of the satisfactory service being provided by existing carriers. We, therefore, conclude that the evidence of the supporting shippers does not justify the authorization of CF's routes between the Southwest and Texas.

Operations over alternate routes for operating convenience only may also be authorized without evidence of public support if three criteria are met: (1) applicant must presently be operating between both termini over a practical and feasible route, (2) it must be competitive with existing carriers operating between the termini by virtue of handling a substantial amount of traffic, and (3) the granting of the alternate-route authority will not allow applicant to provide a new competitive service, *Hayes Frt. Lines, Inc., Ext.—Alternate Routes in Michigan,* 54 M.C.C. 643 (1952). We believe that CF has also failed to meet this three-part test. Although in 1973 CF handled over 42 million pounds of traffic between its five Texas terminals, on the one hand, and, on the other, its Sacramento, Oakland, Los Angeles, and Phoenix terminal groups, this figure becomes relatively insignificant compared to the annual traffic the five opposing carriers handled on an annual basis between these areas. By CF's own calculations, its tonnage moving, for example, from Los Angeles to its authorized Texas points amounted to 22 percent of Western Gillette's tonnage, 18.5 percent of Transcon's tonnage, 29 percent of the tonnage handled by ETMF, 17.5 percent of Lee Way's tonnage, and 17 percent of ICX's tonnage from and to these points. Percentages for traffic handling from and to Oakland are roughly comparable, considerably higher for Sacramento, and substantially lower for Phoenix. Thus, it is unlikely that CF can now be considered an effective competitor with existing carriers between these areas. Even more telling against

applicant's proposal is the fact that the routes it seeks are substantially shorter than its present routes and would allow the establishment of a new service between California, Arizona, and Nevada points on the one hand, and, on the other, points in Texas. The Administrative Law Judge found that the new routes via Benson, Ariz. (which was the route eventually authorized by the Administrative Law Judge), were 44.3 percent shorter than CF's present routes between its Los Angeles, Phoenix, and Oakland terminal areas, and Fort Worth, Tex., and 54.5 percent shorter between its western terminals and San Antonio, Tex. CF indicated that its mileage savings over the shorter routes would be considerable (*e.g.*, 316 miles between Los Angeles and Dallas, Fort Worth, San Antonio, and Waco, and 430 miles between Los Angeles and Houston), and although it did not indicate its present transit times between the involved areas, it is certain that CF would be able to provide a service at least 1 day faster than its present service and, therefore, would be providing a new competitive service. This new operation would cause an unwarranted diversion of the traffic now being satisfactorily handled by ETMF, Lee Way, Transcon, ICX, and Western Gillette. Clearly CF has failed to meet the three-prong test fo alternate-route authority between points in California, Arizona, and Nevada, on the one hand, and, on the other, points in Texas, and this portion of the application must also be denied. Compare *Consolidated Freightways Corp. of Del.—Alternate Routes,* 119 M.C.C. 441 (1974).

The proposed shorter route between Denver, on the one hand, and, on the other, CF's authorized Texas points is, by contrast, only 9.5 percent shorter than its present routes between these termini and would accomplish mileage savings of only 85 miles. CF has shown itself to be a substantial competitor for traffic moving over this route, which generally originates or is destined to States in the Pacific Northwest, and there is no evidence indicating that authorizing operations over this route, as an alternate route for operating convenience only, would significantly alter the competitive situation. Operations over this route will be authorized.

Western Gillette's short-haul proposal.—We agree with the joint board that the portion of Western Gillette's application which would allow it to transport traffic between Dallas, and certain Texas and Oklahoma points, on the one hand, and, on the other, the points it seeks in Louisiana is not required by the present or future public convenience and necessity. The evidence in the Western Gillette proceeding supporting the short-haul proposal is vague, lacking in

specifics, and does not conclusively show any deficiencies in existing service between these points. Both Red Ball and SPT-SWT provide single-line service between Dallas and numerous Louisiana points, including those sought herein, and their transit times are comparable to those proposed by Western Gillette, keeping in mind that applicant considers it satisfactory if it meets its transit times standards plus 1 day 70 percent of the time. Traffic transported between Oklahoma points and Louisiana points is generally handled in joint-line service but again this service seems capable of meeting the reasonable transportation needs of the supporting shippers. We conclude that the Western Gillette application, for the reasons hereinbefore outlined, should be denied in its entirety.

Other matters.—The grant of authority to Red Ball in the initial decision of the Administratives Law Judge provided for the issuance of a limited-term certificate and the submission of annual performance reports. As we previously indicated, we agree that these conditions are required to determine if Red Ball will meet its proposed transit times, and our grant of authority will include these same conditions. We will adhere to the usual form required for performance reports. See *Trans West. Exp., Inc., Ext.—Seattle-Portland,* 118 M.C.C. 1, 13-14 (1973).

In its proposed routes Nos. 12 (a), (b), and (c), noted in appendix A, Red Ball seeks authority to serve off-route points within 5 miles of the routes and also requests service at off-route points in certain described territories denominated the Greater Los Angeles territory, San Francisco territory, and Bakersfield territory. Describing operating authority in terms of mileage radii is to be avoided whenever possible, *Fox-Smythe Transp. Co. Extension—Oklahoma,* 106 M.C.C. 1, 50 (1967), and as the intermediate point authority on these routes provides Red Ball with sufficiently broad coverage, no authority will be granted to serve points within 5 miles of the sought routes. Furthermore, the Commission does not recognize the territories sought by applicant as acceptable territorial descriptions. We note, however, that many of the points in these described territories are either within the commercial zones of Los Angeles, San Francisco, or Bakersfield or are authorized intermediate points on the routes sought. We feel that there is no reason to grant duplicating and largely unnecessary authority in ambiguously defined territories, and, therefore, that portion of the application seeking to serve off-route points in these territories will also be denied. Red Ball's proposed routes descriptions have been modified in part to avoid duplication and to conform to Commission practice. The territory described in the

restriction has been slightly modified for the purposes of clarity. The exceptions in the grant of authority to transport general commodities have been expanded to include classes A and B explosives and articles of unusual value, in conformance with Commission practice.

FINDINGS

In No. MC-2229 (Sub-No. 180), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment) over the routes and subject to the restriction set forth in appendix E.

We further find that the issuance of the certificate authorized herein in No. MC-2229 (Sub-No. 180) should be conditioned upon applicant's acceptance of and compliance with the following conditions:

(1) That the authority granted herein shall be limited in points of time to a period expiring 3 years from the date of the certificate;

(2) That at the close of each of the first 2 full years after the date of issuance of the certificate herein, applicant shall file with the Commission's Bureau of Economics a "Performance Report" with respect to the operations conducted under the certificate; and that this "Performance Report" shall, among other things:

(a) Specifically identify and describe each of the shipments, indicating the transit times thereof, which applicant transported under the certificate between the Texas, New Mexico, Arizona, California, and Nevada points authorized herein, on the one hand, and, on the other, presently authorized points located east of the line described in the restriction to the authority granted herein, particularly those points located in Texas, Louisiana, Mississippi, Alabama, and Arkansas, and

(b) Specifically identify and describe each of those instances when service under the new certificate is refused or not performed by applicant on request, between the points described in (a) above.

(c) Include verified statements from shippers (including consignees) stating clearly their satisfaction or dissatisfaction with the service of applicant rendered under the authority granted herein, preferably including verified statements from shippers (including consignees) which supported the application in this proceeding.

(3) That within 3 months prior to the expiration of the 3-year term, applicant, if it desires that the authority granted herein be extended permanently, shall file with the Commission (with copies to be served upon the protestants in this proceeding), a petition for permanent extension of the certificate issued herein, accompanied by (a) a brief but detailed summary of the material contained in the two prior "Performance Reports," and (b) the same information in (2)(a), (b), and (c) above for the first 6 months of the third year following date of issuance of the limited-term certificate

herein, as well as any other matter considered pertinent by applicant with respect to whether the authority granted herein should at that time be extended permanently;

(4) That jurisdiction will be retained in order that the Commission may delete, modify, or impose such further terms, conditions, and limitations as may in the future be found to be required by the public convenience and necessity or to insure that applicant's operations comport with the type of service the supporting shippers and receivers are shown to require on this record.

In No. MC-42487 (Sub-No. 817) we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment) between Denver, Colo., and Fort Worth, Tex., from Denver over Interstate Highway 25 to Raton, N. Mex., thence over U.S. Highway 87 to Amarillo. Tex., thence over U.S. Highway 287 to Fort Worth, and return over the same route, serving no intermediate points, as an alternate route for operating convenience only, in connection with applicant's authorized regular-route operations.

In No. MC-8948 (Sub-No. 104), we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operations, and that the application should be denied.

We further find that applicants in No. MC-2229 (Sub-No. 180) and No. MC-42487 (Sub-No. 817) are fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the applicable rules and regulations thereunder; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; that an appropriate limited-term certificate subject to the conditions outlined above should be issued to the applicant in No. MC-2229 (Sub-No. 180); that an appropriate certificate should be issued to the applicant in No. MC-42487 (Sub-No. 817); and that the applications in all other respects should be denied.

Upon compliance by applicants in No. MC-2229 (Sub-No. 180) and No. MC-42487 (Sub-No. 817) with the requirements of sections 215, 217, and 221(c) of the act and with the applicable rules and regulations thereunder, an appropriate certificate will be issued to each applicant.

An appropriate order will be entered.

COMMISSIONER GRESHAM concurring in the result.

APPENDIX A

Authority sought

In No. MC-2229 (Sub-No. 180), filed September 17, 1973, as amended, Red Ball Motor Freight, Inc., of Dallas, Tex., seeks to transport general commodities (except household goods as defined by the Commission, commodities in bulk, and those *requiring special equipment*),

(1) Between Fort Worth and El Paso, Tex., over U.S. Highway 80 (Interstate Highways 20 and 10), serving all intermediate points;

(2) Between Houston, Tex., and the junction of U.S. Highway 80 (Interstate Highway 20) and U.S. Highway 290 (Interstate Highway 10), from Houston over U.S. Highway 290 to its junction with Interstate Highway 10, and thence over U.S. Highway 290 (Interstate Highway 10) to its junction with U.S. Highway 80 (Interstate Highway 20), and return over the same route, serving no intermediate points and serving the junction of U.S. Highway 290 and Interstate Highway 10 for purpose of joinder only;

(3) Between Houston, Tex., and the junction of Interstate Highway 10 and U.S. Highway 290, from Houston over Interstate Highway 10 to its junction with U.S. Highway 290, and return over the same route, serving no intermediate points and serving the junction of Interstate Highway 10 and U.S. Highway 290 for purposes of joinder only;

(4) Between El Paso, Tex., and Phoenix, Ariz., from El Paso over U.S. Highway 80 (Interstate Highway 10) to Lordsburg, N. Mex., thence over U.S. Highway 70 to Globe, Ariz., and thence over U.S. Highway 60 to Phoenix, and return over the same route, serving the intermediate points of Mesa, Superior, Miami, Globe, Bylas, Fort Thomas, Glenbar, Pima, Central, Thatcher, Safford, Solomonsville, and Duncan, Ariz., and Lordsburg, Deming, and Las Cruces, N. Mex.;

(5) Between Lordsburg, N. Mex., and Tucson, Ariz., over Interstate Highway 10, serving no intermediate points;

(6) Between Tucson and Nogales, Ariz., over U.S. Highway 89 (Interstate Highway 19), *serving all intermediate points*;

(7) Between Tucson and Phoenix, Ariz., (a) over Interstate Highway 10, serving all intermediate points, and (b) from Tucson over U.S. Highway 89 to its junction with U.S. Highway 80, and thence over U.S. Highway 80 to Phoenix, and return over the same route, serving all intermediate points;

(8) Between the junction of Interstate Highway 10 and Interstate Highway 8 at or near Casa Grande, Ariz., and the junction of Interstate Highway 8 and U.S. Highway 80 at or near Gila Bend, Ariz., over Interstate Highway 8 (Arizona Highway 84), serving all intermeidate points;

(9) Between Phoenix and Yuma, Ariz., over U.S. Highway 80, serving all intermediate points;

(10) Between Yuma, Ariz., and Los Angeles, Calif., (a) from Yuma over U.S. Highway 80 (Interstate Highway 8) to San Diego, Calif., and thence over Interstate Highway 5 to Los Angeles, and return over the same route, serving all intermediate points, and (b) from Yuma over U.S. Highway 80 (Interstate Highway 8) to its junction with California Highway 111, thence over California Highway 111 to its junction with Interstate Highway 10 (also from the junction of California Highways 111 and 86 over California Highway 86 to its junction with Interstate Highway 10), and thence over Interstate Highway 10 to Los Angeles, and return over the same route, serving all intermediate points;

(11) Between Phoenix, Ariz., and Los Angeles, Calif., over U.S. Highway 60 (Interstate Highway 10), serving all intermediate points;

(12) Between Los Angeles and San Francisco, Calif., (a) from Los Angeles, over Interstate Highway 5 to its junction with Interstate Highway 580, and thence over Interstate Highway 580 to San Francisco, and return over the same route, (b) from Los Angeles over Interstate Highway 5 to its junction with California Highway 99, thence over California Highway 99 to Sacramento, Calif., and thence over Interstate Highway 80 to San Francisco, and return over the same route, and (c) over U.S. Highway 101, serving all intermediate points on routes (a), (b), and (c), and serving off-route points within 5 miles of the routes, and all points in the Greater Los Angeles territory, Bakersfield territory, and the San Francisco territory (as described below) as off-route points:

The Greater Los Angeles territory includes the area embraced by the following boundary: Beginning at the intersection of the westerly boundary of the city of Los Angeles and the Pacific Ocean, thence northerly and easterly along the boundary of the city of Los Angeles to its points of first intersection with the boundary of the Los Angeles National Forest, thence along the southerly boundary of the Los Angeles National Forest, and southerly boundary of the San Bernardino National Forest to the point of first intersection of the southerly boundary of the San Bernardino National Forest and the San Bernardino-Riverside County line, thence westerly along the San Bernardino-Riverside County line to a point on said line distant 5 miles east from the junction of said county line and Interstate Highway 15 (formerly U.S. Highway 91), thence southwesterly along a line parallel to and distant 5 miles from Interstate Highway 15 (formerly U.S. Highway 91), State Highway 55, and the prolongation of State Highway 55 to its junction with the Pacific Ocean, thence westerly and northerly along the coast line of the Pacific Ocean to the point of beginning.

San Francisco territory includes that area embraced by the following boundary: Beginning at the point where the San Francisco-San Mateo County boundary line meets the Pacific Ocean, thence easterly along said boundary line to a point 1 mile west of U.S. Highway 101, thence southerly along an imaginary line 1 mile west of and paralleling U.S. Highway 101 to its intersection with the corporate boundary of the city of San Jose, thence southerly, easterly, and northerly along said corporate boundary to its intersection with State Highway 17, thence northerly along State Highway 17 to Warm Springs, thence northerly along the unnumbered highway via Mission San Jose and Niles to Hayward, thence northerly along Foothill Boulevard to Seminary Avenue, thence easterly along Seminary Avenue to Mountain Boulevard, thence northerly along Mountain Boulevard and Morgan Avenue to Estates Drive, thence westerly along Estates Drive, Harbord Drive and Broadway Terrace to College Avenue, thence northerly along College Avenue to Dwight Way, thence easterly along Dwight Way to the Berkeley-Oakland boundary line, thence northerly along said boundary line to the campus boundary of the University of California, thence northerly and westerly along the campus boundary of the University of California to Euclid Avenue, thence northerly along Euclid Avenue to Marlin Avenue, thence westerly along Marlin Avenue to Arlington Avenue, thence northerly along Arlington Avenue to Interstate Highway 80 (formerly U.S. Highway 40) (San Pablo Avenue), thence northerly along Interstate Highway 80 to and including the city of Richmond, thence southwesterly along the highway extending from the city of Richmond to Point Richmond, thence southerly along an imaginary line from Point Richmond to the San

Francisco waterfront at the foot of Market Street, thence westerly along waterfront and shoreline to the Pacific Ocean, and thence southerly along the shoreline of the Pacific Ocean to the point of beginning.

Bakersfield Territory includes that area embraced by the following and within a radius of 5 miles of the outerboundaries thereof: Beginning on California Highway 99 (formerly U.S. Highway 99) at its junction with the northerly boundary of Kern County, Calif., thence south via California Highway 99 to its junction with California State Highway 166, thence westerly along State Highway 166 to its junction with California State Highway 33, thence northerly along State Highway 33 to its junction with unnumbered county highway extending in a generally northerly direction to its junction with California Highway 58 (formerly U.S. Highway 466) at Lost Hills, thence along said county highway to Lost Hills, thence easterly along California Highway 58 to its junction with an unnumbered county highway approximately 7 miles east of Lost Hills which said highway extents in a generally northerly direction, thence along said unnumbered county highway to its junction with the northerly boundary of Kern County, and thence east along the northerly boundary of Kern County to the point of beginning.

(13) Between Sacramento, Calif., and Reno, Nev., (a) over Interstate Highway 80, serving all intermediate points, and (b) from Sacramento over U.S. Highway 50 to its junction with U.S. Highway 395, and thence over U.S. Highway 395 to Reno, and return over the same route, serving all intermediate points;

(14) Between Los Angeles, Calif., and the junction of U.S. Highways 50 and 395 near Carson City, Nev., from Los Angeles over Interstate Highway 10 to San Bernardino, Calif., and thence over U.S. Highway 395 to its junction with U.S. Highway 50 near Carson City, and return over the same route, serving all intermediate points;

(15) Between the junction of Interstate Highway 5 and California Highway 14 and the junction of California Highway 14 and U.S. Highway 395, over California Highway 14, serving all intermediate points;

(16) Between Amarillo, Tex., and Los Angeles, Calif., from Amarillo over U.S. Highway 66 (Interstate Highway 40) to Barstow, Calif., thence over U.S. Highway 66 (Interstate Highway 15) to San Bernardino, Calif., and thence over Interstate Highway 10 to Los Angeles, and return over the same route, serving no intermediate points and serving Barstow for the purpose of joinder only; and

(17) Between Barstow, Calif., and the junction of California Highway 58 and Interstate Highway 58 and Interstate Highway 5, over California Highway 58, serving no intermediate points and serving Barstow, the junction of California Highway 58 and U.S. Highway 395, Bakersfield, and the junction of California Highway 58 and Interstate Highway 5 for the purpose of joinder only.

Restriction: The foregoing routes (1) through (17) to be restricted against the transportation of shipments having both an origin and a destination located on or west of a line extending from Galveston, Tex., to the United States-Canada boundary line as follows: from Galveston over Interstate Highway 45 to its junction with Interstate Highway 30, thence over Interstate Highway 30 to its junction with Interstate Highway 40, thence over Interstate Highway 40 to Memphis, Tenn., thence over Interstate Highway 55 to Chicago, Ill., and thence via the west bank of Lake Michigan and Lake Superior to the United States-Canada boundary line.

In No. MC-8948 (Sub-No. 104), filed June 18, 1973, as amended, Western Gillette, Inc., of Los Angeles, Calif., seek to transport general commodities (except classes A

and B explosives, livestock, articles of unusual value, household goods as defined by the Commission, commodities in bulk, in tank vehicles, and commodities requiring special equipment),

(1) Between Dallas, Tex., and New Orleans, La.: from Dallas, Tex., over Interstate Highway 20 to junction U.S. Highway 71 at Shreveport, La., thence over U.S. Highway 71 to junction U.S. Highway 190 at Krotz Springs, La., thence over U.S. Highway 190 to junction U.S. Highway 61 at Baton Rouge, La., thence over U.S. Highway 61 to New Orleans and return over the same route, serving Shreveport, Baton Rouge, and all points on U.S. Highway 61 between Baton Rouge and New Orleans as intermediate points; and Bossier City as an off-route point, and serving Krotz Springs, La., for purposes of joinder only;

(2) Between Houston, Tex., and Baton Rouge, La.: from Houston, Tex., over Interstate Highway 10 to junction U.S. Highway 167 Lafayette, La., thence over U.S. Highway 167 to junction U.S. Highway 190 near Opelousas, La., thence over U.S. Highway 190 to Baton Rouge, La., and return over the same route, serving no intermediate points except as otherwise authorized, but serving the intermediate point of Krotz Springs, La., for purposes of joinder only, restricted to traffic moving to, from or through either El Paso or Dallas, Tex.

Restriction: Service over both routes above described is restricted against traffic moving between points both of which lie east of a line drawn from the westerly boundaries of the States of Louisiana, Arkansas, Missouri, Iowa and Minnesota.

In No. MC-42487 (Sub-No. 817), filed December 7, 1973, as amended, Consolidated Freightways Corporation of Delaware, of Menlo Park, Calif., seeks to transport general commodities (except those of unusual value, classes A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, in tank vehicles and those requiring special equipment): (1) between Benson, Ariz., and Baton Rouge, La., from Benson over Interstate Highway 10 to Baton Rouge, and return over the same route, serving San Antonio, Houston, Beaumont, and Orange, Tex., and Lake Charles, La., as intermediate points, and Port Arthur, Tex., as an off-route point, with service at the junction of Interstate Highways 10 and 20 as a point of joinder only; (2) between the junction of Interstate Highways 10 and 20 and Jackson, Miss., from the junction of Interstate Highways 10 and 20 over Interstate Highway 20 to Jackson, Miss., and return over the same route, serving Fort Worth and Dallas, Tex., and Shreveport, La., as intermediate points; (3) between Flagstaff, Ariz., and Fort Worth, Tex., from Flagstaff over Interstate Highway 40 to Amarillo, Tex., thence over U.S. Highway 287 to Fort Worth and return over the same route, serving Amarillo, Tex., as a point of joinder only; (4) between Denver, Colo., and Amarillo, Tex., from Denver over Interstate Highway 25 to Raton, N. Mex., thence over U.S. Highway 87 to Amarillo, Tex., and return over the same route, with service at Amarillo as a point of joinder only; (5) between Shreveport and Baton Rouge, La., from Shreveport over U.S. Highway 71 to its junction with U.S. Highway 190 (near Krotz Springs, La.) thence over U.S. Highway 190 to Baton Rouge (also from Shreveport over Louisiana Highway 1 to Baton Rouge) and return over the same route; (6) between Baton Rouge and New Orleans, La., from Baton Rouge over U.S. Highway 61 to New Orleans, and return over the same route, serving Laplace, La., as a point of joinder only; (7) between Jackson, Miss., and Laplace, La., from Jackson over Interstate Highway 55 to junction U.S. Highway 51, thence over U.S. Highway 51 to Laplace, La., and return over the same route, with service at Laplace as a point of joinder only; (8) between Baton Rouge, La., and junction U.S. Highways 190 and 90 (near Pearlington, Miss.), from Baton Rouge over U.S. Highway 190 to its junction with U.S. Highway 90, and return over the same route, serving the junction of U.S.

Highways 190 and 90 for purposes of joinder only; (9) between New Orleans, La., and Mobile, Ala., from New Orleans over U.S. Highway 90 to Mobile, and return over the same route, serving the junction of U.S. Highways 190 and 90 (near Pearlington, Miss.) as a point of joinder only; and (10) between Jackson, Miss., and Mobile, Ala., from Jackson over U.S. Highway 49 to Hattiesburg, Miss., thence over U.S. Highway 98 to Mobile, and return over the same route; restricted against tacking at any point west of a line drawn along the westerly boundaries of the States of Louisiana, Arkansas, Missouri (including points in the Kansas City commercial zone), Iowa, and Minnesota in order to provide service on shipments between two points both of which are east of said line.

APPENDIX B

Protestants

Braswell Motor Freight Lines, Inc., East Texas Motor Freight Lines, Inc., Lee Way Motor Freight, Inc., and Saia Motor Freight Lines, Inc., oppose all three applications.

Merchants Fast Motor Lines, Inc., Illinois-California Express, Inc., Central Freight Lines, Inc., Western Gillette, Inc., Herder Truck Lines, Inc., and Transcon Lines oppose the application in the Red Ball proceeding and the application in the Consolidated Freightways proceeding.

McLean Trucking Company, Mercury Freight Lines, Inc., Red Ball Motor Freight, Inc., Southern Pacific Transport Company of Texas and Louisiana, and Southwestern Transportation Company are protestants in both the Consolidated Freightways and Western Gillette proceedings.

Citizen Express Lines, Whitfield Transportation, Inc., Garrett Freight Lines, Inc., J. H. Rose Truck Line, Inc., Curry Motor Freight Lines, Inc., IML Freight, Inc., and T.I.M.E.-DC. Inc., oppose only the application in the Red Ball proceeding.

O.N.C. Freight Systems, Red Arrow Freight Lines, Inc., Brown Express, Inc., Roadway Express, Inc., Central Express, Inc., Pacific Motor Trucking Company, and Yellow Freight System are protestants only in the Consolidated Freightways proceeding.

Southeastern Motor Freight, Inc., is a protestant only in the Western Gillette proceeding.

APPENDIX C

A. Exceptions and replies in the Red Ball proceeding

1. *Joint Exceptions of Central Freight, Saia, ETMF, Braswell, Lee Way, Transcon, and T.I.M.E.-DC.*—Protestants primary assignment of error is that the Administrative Law Judge failed to conclude that existing joint-line and single-line service between Red Ball's present service area in Louisiana, Mississippi, Alabama, Arkansas, and east Texas and its proposed service area in the southwestern and western portions of the United States is adequate to meet the transportation needs of the shipping public and that Red Ball's proposed service would not constitute an improvement over such existing service. They argue that the evidence of shipper support is deficient for numerous reasons including shippers' alleged failure to investigate and use all available service, and the supposed paucity of problems with existing service that shippers have submitted. Protestants contend that past applications for regular-route extensions of authority similarly broad in scope to the Red Ball application and with similar supporting evidence have been denied by the Commission. Exceptants also

argue that Red Ball has failed to demonstrate that it can provide the transit times it has proposed herein, and that applicant has failed to demonstrate the operational feasibility of the proposed service and its fitness to conduct the involved operation and to conform to the Commission's rules and regulations.

2. *Joint exceptions of ICX, Garrett, Citizen Express, and Whitfield.*—Exceptants generally take issue with the Administrative Law Judge's finding that there is a need for the proposed service and contend that there is adequate service in the territory Red Ball seeks to serve.

3. *Exception of Western Gillette.*—Western Gillette argues that the evidence fails to demonstrate a need for applicant's single-line service in lieu of existing joint-line service and that to the extent Red Ball's service duplicates that sought by Western Gillette, the Western Gillette application should have been granted and the Red Ball application denied.

4. *Exception of J. H. Rose.*—Rose asserts that the Administrative Law Judge erred in failing to find its transportation of "size-and-weight" commodities, self-propelled articles weighing 15,000 pounds or more, and "Mercer" and earth-drilling commodities within the involved territory adequate to meet the needs of the shipping public and it contends that its interest should have been protected.

5. *Exceptions of Merchants Fast.*—Merchants takes the Administrative Law Judge to task for failing to assess its service in the area of west Texas it is authorized to serve, not comparing its operations therein with Red Ball's proposed operations, and failing to determine the effect on Merchants of the grant of the proposed authority. (The separate joint exceptions filed by ETMF and Braswell are summarized under "Preliminary Matters.")

6. *Reply by Red Ball.*—Replicant generally takes the position that the initial decision of the Administrative Law Judge is correct; that the exceptions of the protestants are without merit; that the evidence of record demonstrates a public need for the proposed service and that existing service is inadequate between the involved points; that the effect of a grant of authority on existing carriers would not be harmful; that its proposed operation is operationally feasible; and that it is fit, willing, and able to conduct the proposed operation.

B. Exceptions and replies in the Western Gillette proceeding

1. *Exceptions of applicant.*—Applicant in general asserts the joint board erred in failing to find that public convenience and necessity require the proposed service. More specifically it argues that the joint board incorrectly summarized the evidence, made significant distortions and omissions in summarizing the testimony, had a biased attitude in favor of protestants and particularly an oversolicitous approach to local service in Louisiana, and mistakenly concluded that a grant of the authority sought would adversely affect the transportation service received by small communities in Louisiana.

2. *Replies by Red Ball, jointly by Saia and Braswell, and jointly by ETMF, Lee Way, McLean, Mercury, Southeastern, SPT, and SWT.*—Replicants generally assert that the denial of the application is proper; that public convenience and necessity does not require the proposed service; and that the initial decision of the joint board should be affirmed.

C. Exceptions and replies in the Consolidated Freightways proceeding

1. *Joint exceptions of Braswell, Brown, Central Express, Central Freight, ETMF, Herder, Lee Way, Merchants Fast, PMT, Red Arrow, Saia, SPT, SWT, and*

Transcon.—Exceptants generally contend that the Administrative Law Judge erred in granting authority to Consolidated Freightways to serve the four new service points in Louisiana and Jackson, Miss., and Mobile, Ala., and to shorten its routes between points in the western States it serves and points in Texas. More specifically they argue that the record does not support the conclusion that the transit times of existing carriers between the points involved is excessive and do not meet the reasonable needs of the shipping public; that it is not true that applicant will be able to provide a more expeditious service between the points involved than that provided by protestants; that applicant is not competitive between Arizona, Nevada, and California, on the one hand, and, on the other, Texas and should not be allowed to shorten its routes between these States; that the grant of authority to applicant will adversely affect the services of existing carriers and this factor is not outweighed by any benefit to the public that will accrue from the proposed service; and that public convenience and necessity do not require a grant of the sought authority.

2. *Supplemental joint exceptions of Brown, Central Express, Central Freight, Herder, Merchants Fast, Red Arrow, Saia, SPT, and SWT.*—These regional carriers claim that the grant of authority to applicant to serve major points in the Gulf Coast States will have a particularly adverse impact on their transportation of short-haul traffic and their service to small intermediate points. They argue that permitting applicant to be selective in terms of serving large cities and providing long-haul service will constitute "cream skimming" that will take lucrative traffic away from small carriers and cause their service to small cities and towns to deteriorate.

3. *Joint exceptions of ICX, Mercury, and O.N.C.*—Exceptants generally argue that the grant of authority is unwarranted; that the proposed single-line service will not be superior to existing joint-line service; that the evidence of shipper support does not demonstrate that existing service is inadequate or that an improved service is required; and that the grant of authority sought will have an adverse effect on the services of existing carriers.

4. *Exceptions of Red Ball.*—Red Ball asserts that applicant is being overly selective in seeking to serve only major points in contrast to Red Ball's approach in its application; that there is no need for service between either the northwest territory CF now serves or Denver and the six points granted by the Administrative Law Judge; and that there has been no conclusion showing that CF can meet the transit time proposals it has made herein.

5. *Exceptions of Western Gillette.*—Western Gillette objects only to the grant of authority to CF enabling it to shorten its routes between the Southwestern States and Texas, arguing that CF's existing routes between these States are far longer than its proposed routes and that applicant is not a competitive factor on traffic moving between these two States.

6. *Reply by applicant.*—CF generally argues that the exceptions of protestants are without merit, that the grant of authority is amply supported by the evidence, and that the initial decision of the Administrative Law Judge to the extent authority is granted, should be affirmed.

7. *Exceptions of applicant.*—Applicant objects only to the Administrative Law Judge's modification of its restriction by further limiting the traffic it can handle. It suggests an alternative restriction which would assertedly accomplish the same purpose.

8. *Joint reply by ETMF, Braswell, Central Freight, and Saia and separate reply by McLean.*—Replicants contend that the restriction imposed by the Administrative Law Judge is proper and that CF's exceptions are without merit.

APPENDIX D

1. Braswell holds authority to provide service over a series of regular routes extending from Los Angeles on the west to points in Alabama (including Mobile) on the east, and it can serve Phoenix, Tucson and Yuma, Ariz., El Paso, Houston, Dallas, Fort Worth, San Antonio, and Waco, Tex., Tulsa and Oklahoma City, Okla., New Orleans, Baton Rouge, Shreveport, Alexandria, Bossier City, and Monroe, La., and Jackson and Natchez, Miss. Braswell, therefore, can provide single-line service between Los Angeles and its Arizona, New Mexico, and west Texas service areas on the one hand, and, on the other, many of the points in the involved gulf coast territory, including all the points sought by CF and Western Gillette except Lake Charles, La. The periods selected for Braswell's transit time studies ranged from 4 to 29 days.

2. ETMF has regular-route authority stretching from Seattle, Los Angeles, and San Francisco on the west to Dallas, Houston, and Shreveport on the east and is able to serve numerous points in Oregon, Washington, Arizona, California, Utah, and Texas. To serve points in Louisiana other than Shreveport, ETMF interlines with other carriers (primarily Saia) at Houston and Shreveport and also conducts joint-line operations at Shreveport, Memphis, and Birmingham to serve points in Alabama and Mississippi. Transit times studies for single-line service (Shreveport and east Texas) covered 1 week. For joint-line transit time studies see evidence under Saia.

3. Lee Way operates over routes which extend from Los Angeles, San Francisco, Oakland, and San Diego on the west, to Dallas, Houston, Memphis, Tenn., and Birmingham, Ala., on the east, and it serves numerous points in California, Arizona, New Mexico, Colorado, Texas, and Oklahoma. It holds no direct authority to provide any of the proposed service with the exception of CF's proposal to shorten its routes to Texas. Lee Way serves the gulf coast area herein by interlining at Dallas with Red Ball, Merchants, and Central and at Houston with Saia as well as with other carriers at Memphis and Birmingham. Protestant's transit time analysis showed traffic moving during a 6-month period between California and Arizona, on the one hand, and, on the other, Dallas and Houston where interchange took place with Red Ball. Transit times for traffic it handled in joint-line service to Louisiana is summarized under Saia's evidence.

4. Saia operates over regular routes primarily in Louisiana and has routes extending as far west as Houston. It is authorized to serve numerous points in Louisiana including New Orleans, Baton Rouge, Lake Charles, and Shreveport and interlines at Houston and Shreveport with such carriers as ETMF, Lee Way, Transcon, Western Gillette, and CF. Saia introduced exhibits of extensive traffic studies of shipments it transported in joint-line service between the Western United States and Louisiana. The long-haul carriers with which these shipments were interlined are ETMF, Lee Way, Transcon, Western Gillette, and CF. The time periods involved were 1 month for all the transit time studies.

5. Merchants Fast conducts operations over regular routes solely in Texas. These routes extend from El Paso on the west to Dallas and Houston on the east and from Amarillo on the north to San Antonio on the south. Merchants' primary reason for opposing the Red Ball application is its fear that traffic it has handled in joint-line service (generally interchange takes place at Dallas with Red Ball) between points in central and west Texas on the one hand, and, on the other, points in the Gulf Coast States which Red Ball now serves, will be diverted. It is also concerned about shipments handled between points in east Texas (east of the line contained in the restriction) and points in Western States which it now interlines at El Paso and other

west Texas points. In the CF proceeding Merchants mainly fears diversion of traffic moving between east Texas points and Western States which it interlines with O.N.C. at El Paso. The period of time contained in Merchants' studies of its own transit time is 15 days.

6. ICX is a long-haul carrier with routes extending from Los Angeles, San Francisco, Sacramento, and San Diego, Calif., on the west to Dallas and Amarillo, Tex., on the east. It serves numerous points in California, Arizona (including Phoenix and Flagstaff), Utah, Wyoming, Colorado (including Denver), and Texas. It interlines traffic destined to the Gulf Coast States area at Dallas and Amarillo primarily with Red Ball, Central, and Mercury. It also interchanges traffic at Denver moving from States in the Northwest.

7. Central Freight and Central Express are commonly controlled carriers operating solely in east Texas. Protestants interchange traffic at Houston and Dallas with numerous carriers. Such traffic moves between the points in east Texas which Central serves and points in the Western States involved herein. Long-haul carriers with which protestants conduct interline operations include Braswell, ICX, ETMF, Lee Way, Western Gillette, Transcon, and CF. The time periods covered in protestants' transit time studies were 1 month in the Red Ball case, and 3 months in the CF proceeding (this involved traffic destined to Beaumont).

8. Western Gillette, as described in the applicants' evidentiary portion of this report, operates over routes extending from California through Arizona, Nevada, New Mexico, Oklahoma, and Texas as far east as Dallas and Houston. At the latter two points and at Memphis, it interchanges traffic originating at or destined to Louisiana, Mississippi, and Alabama. Its primary connecting carriers at these points are Red Ball and Saia. It major reason for opposing the CF proceeding is the shorter routes CF seeks between the Western States and Texas points such as Houston, Dallas, and Fort Worth.

9. Herder is a registered carrier operating over a route between Houston and San Antonio, Tex., and serving a large number of intermediate points. It provides joint-line service (sometimes as a bridge carrier) on traffic moving between Louisiana, Mississippi, Alabama, and east Texas on the one hand, and, on the other, the Western States here involved. It interlines at San Antonio with Whitfield. Protestant is also concerned about CF's proposal to shorten its routes from and to Texas points.

10. Transcon operates over extensive regular routes and can transport traffic between numerous points in California, Arizona, Colorado, Oregon, and Washington, on the one hand, and, on the other, Dallas and Houston, Tex., Birmingham, Ala., and Memphis, Tenn. It conducts joint-line operations at Houston and Dallas primarily with Saia, SPT, Red Ball, and Central to serve east Texas and Louisiana points, and interlines at Birmingham and Memphis to handled Mississippi and Alabama traffic. Its transit time studies for traffic interlined with Central covered 1 month. The periods for transit times for its joint-line traffic with Saia are summarized under Saia's evidence.

11. McLean is a large common carrier with routes enabling it to operate between Dallas, Fort Worth, Houston, and San Antonio, Tex., on the one hand, and, on the other, Shreveport, Lake Charles, Baton Rouge, and New Orleans, La. Its interest in opposing the CF and Western Gillette applications is the traffic it handles between Texas and Louisiana points. It showed its transit times over a selected period of 1 month.

12. Mercury operates over routes stretching as far east as Mobile and as far west as Houston, Dallas, and Fort Worth, and also serves Baton Rouge and Lake Charles. It provides joint-line service between its Louisiana and Alabama service points, on the

one hand, and, on the other, points in various Western States by interlining at Dallas and Houston. Its primary connecting carriers are ICX (at Dallas) and Lee Way (at Houston). Mercury is also concerned about local traffic it presently handles on a direct-line basis between Texas and Louisiana points.

13. Red Ball, whose authority was described earlier, operates over regular routes in east Texas, Louisiana, Mississippi, and Alabama. It can perform direct-line operations between Houston, Dallas, and Fort Worth, on the one hand, and, on the other, all the Louisiana points sought by Western Gillette and CF as well as Jackson, Miss., and Mobile, Ala. Red Ball also interchanges traffic shipped between the above-indicated points on the one hand, and, on the other, points in various Western States by interlining at Dallas, Houston, Fort Worth, Amarillo, and Denver.

14. SPT, SWT, and PMT are commonly controlled carriers affiliated with the Southern Pacific Transportation Company. SPT's and SWT's opposition to the Western Gillette application is based on their single-line service between Dallas, on the one hand, and, on the other, New Orleans and Shreveport. In the CF proceeding their ability to perform single-line service between Houston and Dallas, on the one hand, and, on the other, CF's proposed service points in Louisiana is also relevant. SPT and SWT also participate in joint-line service on traffic moving between points in California, Washington, and Oregon, on the one hand, and, on the other, the Louisiana points which CF seeks herein. Traffic is generally interlined at Dallas and Houston. PMT operates over regular routes in Oregon, California, Nevada, Arizona, New Mexico, and Texas and has a pending application to have removed the restriction in its certificate requiring it to provide rail-related services. A grant of such authority will enable PMT to interline at El Paso with carriers serving the Gulf Coast States.

15. Citizen Express is a small carrier operating over a route between Tucson and Nogales, Ariz., and serving all intermediate points and off-route points within 5 miles of its regular route. It interchanges traffic with numerous long-haul carriers serving points in Red Ball's authorized territory and Texas.

16. Whitfield operates over authorized service routes that permit it to provide service between Dallas, Fort Worth, and San Antonio, Tex., on the one hand, and, on the other, El Paso, Tex., numerous points in New Mexico (including Lordsburg, Deming, and Las Cruces) and Arizona (including Phoenix and Tucson). It fears diversion of traffic it has been interlining with Red Ball at Dallas. Whitfield's two traffic studies of its performance regarding transit times were for periods of 1 day to 3 days.

17. Garrett, can provide service over routes extending from Denver and Albuquerque to Reno, Nev., and points in California. Traffic originating or destined to the gulf coast area is interchanged at Denver with Red Ball, T.I.M.E.-DC, Yellow, and Lee Way, and at Albuquerque with ICX and Yellow. Garrett is concerned about the loss of this Nevada and California traffic.

18. J. H. Rose, the only protestant in these proceedings not authorized to transport general commodities over regular routes, is certificated to transport "Mercer" commodities, earth-drilling equipment, "size-and-weight" commodities, and self-propelled articles weighing 15,000 pounds or more between points in California, Nevada, Arizona, New Mexico, and Texas, on the one hand, and, on the other, points in Texas; Louisiana, Arkansas, Mississippi, Alabama, and Tennessee. It also possesses authority to transport specific commodities within the scope of this application.

19. Curry operates over routes in central and west Texas and serving Midland and Odessa. It interlines traffic at various Texas points including San Antonio and Amarillo.

20. IML operates over routes stretching westward from Denver to points in Arizona (including Phoenix), Nevada (including Reno), and California (including Los Angeles and San Francisco). It interlines freight at Denver with Red Ball, and is concerned about loss of this traffic if Red Ball is granted direct authority to serve Western States. The exhibit protestant introduces to show its transit times relating to this proceeding including shipments interlined at Denver between March 25 and May 8, 1974, or for a period of approximately 45 days.

21. T.I.M.E.-DC operates over routes extending in a westerly direction from Dallas and Fort Worth into New Mexico, Arizona, and California. Traffic moving between the Western States, on the one hand, and, on the other, points in the Gulf Coast States involved herein is generally interlined at Memphis, Tenn. Protestant is also assertedly concerned about direct-line service Red Ball will be able to provide between Atlanta and the points sought herein because of the granting of the authority Red Ball sought in its Sub-No. 132 application. T.I.M.E.-DC's routes extend to Atlanta and it can now provide such direct-line service.

22. O.N.C. operates over routes stretching westerly from El Paso into Arizona, California, Oregon, Washington, and British Columbia, and serves many of the major points in this territory. Protestant interchanges freight at El Paso with Merchants. Its major concern appears to be CF's efforts to shorten its routes between Texas points, on the one hand, and, on the other, points in the Southwest and Pacific Northwest.

23. Red Arrow is a registered carrier operating wholly within Texas. Its service area is generally bounded by Dallas and Fort Worth, on the north, McAllen on the south, Houston on the east, and San Antonio on the west. It participates in joint-line service on traffic moving between California, on the one hand, and, on the other, Houston and San Antonio with interchange occurring at Dallas. Red Arrow also interchanges freight shipped between Dallas, Houston, and San Antonio on the one hand, and, on the other, points in Louisiana and Alabama. Its connecting carriers include CF, ETMF, ICX, Lee Way, McLean, Red Ball, Transcon, and Western Gillette.

24. Brown is a registered carrier operating solely in east and central Texas and serving Dallas, Fort Worth, Houston, San Antonio, and Waco. It interchanges traffic at Dallas, Houston, San Antonio, and Waco originating at or destined to points in Louisiana, Mississippi, and Alabama. Brown also is opposed to CF's attempt to shorten its routes between Texas points, on the one hand, and, on the other, points in Arizona and California. Protestant participates in joint-line service between these areas.

25. Roadway can provide service between Shreveport, Baton Rouge, and New Orleans, La., and Jackson, Miss., on the one hand, and, on the other, points in numerous States generally east of the Mississippi River. Its interest would be protected if any grant of authority to CF were restricted in a manner similar to the restriction proposed by CF.

26. Yellow opposes the CF application only to the extent authority is sought to Beaumont and Orange, Tex. As these points were denied by the Administrative Law Judge and no exceptions were filed, the evidence of Yellow need not be summarized.

27. Southeastern Motor Freight is a registered carrier operating in the southeastern portion of Louisiana. It serves New Orleans and certain points on U.S. Highway 61 between New Orleans and Laplace, interchanging traffic at New Orleans. It opposes the Western Gillette application to present diversion of traffic it is handling from and to points on U.S. Highway 61.

APPENDIX E

Regular routes authorized in No. MC-2229 (Sub-No. 180)

(1) Between Fort Worth and El Paso, Tex., over U.S. Highway 80, serving all intermediate points;

(2) Between Houston, Tex., and the junction of U.S. Highway 80 and U.S. Highway 290 near Kent, Tex., from Houston over U.S. Highway 290 to junction U.S. Highway 80 and return over the same route, serving no intermediate points and serving the junction of U.S. Highway 290 and Interstate Highway 10 for purpose of joinder only;

(3) Between Houston, Tex., and the junction of Interstate Highway 10 and U.S. Highway 290, near Harper, Tex., from Houston over Interstate Highway 10 to junction U.S. Highway 290, and return over the same route, serving no intermediate points and serving the junction of Interstate Highway 10 and U.S. Highway 290 for purpose of joinder only;

(4) Between El Paso, Tex., and Phoenix, Ariz., from El Paso over U.S. Highway 80 to Lordsburg, N. Mex., thence over U.S. Highway 70 to Globe, Ariz., and thence over U.S. Highway 60 to Phoenix, and return over the same route, serving the intermediate points of Mesa, Superior, Miami, Globe, Bylas, Fort Thomas, Glenbar, Pima, Central, Thatcher, Safford, Solomon, and Duncan, Ariz., and Lordsburg, Deming, and Las Cruces, N. Mex.;

(5) Between Lordsburg, N. Mex., and Tucson, Ariz., over Interstate Highway 10, serving no intermediate points;

(6) Between Tucson and Nogales, Ariz., over U.S. Highway 89, serving all intermediate points;

(7) Between Tucson and Phoenix, Ariz., (a) over Interstate Highway 10, serving all intermediate points, and (b) from Tucson over U.S. Highway 89 to junction U.S. Highway 80, and thence over U.S. Highway 80 to Phoenix, and return over the same route, serving all intermediate points;

(8) Between the junction of Interstate Highway 10 and Interstate Highway 8 at or near Casa Grande, Ariz., and the junction of Interstate Highway 8 and U.S. Highway 80 at or near Gila Bend, Ariz., over Interstate Highway 8, serving all intermediate points;

(9) Between Phoenix and Yuma, Ariz., over U.S. Highway 80, serving all intermediate points;

(10) Between Yuma, Ariz., and Los Angeles, Calif., from Yuma over U.S. Highway 80 to San Diego, Calif., and thence over Interstate Highway 5 to Los Angeles, and return over the same routes, serving all intermediate points;

(11) Between the junction of U.S. Highway 80 and California Highway 111 near El Centro, Calif., and the junction of California Highway 111 and Interstate Highway 10 near Indio, Calif., over California Highway 111, serving all intermediate points;

(12) Between the junction of California Highway 111 and California Highway 86 near Brawley, Calif., and the junction of California Highway 86 and Interstate Highway 10, over California Highway 86, serving all intermediate points;

(13) Between Phoenix, Ariz., and Los Angeles, Calif., over U.S. Highway 60, serving all intermediate points;

(14) Between Los Angeles and San Francisco, Calif., (a) from Los Angeles over Interstate Highway 5 to its junction with Interstate Highway 580, and thence over Interstate Highway 580 to San Francisco, and return over the same route, serving all intermediate points, and (b) over U.S. Highway 101, serving all intermediate points;

(15) Between the junction of Interstate Highway 5 and California Highway 99 near Wheeler Ridge, and San Francisco, from the junction of Interstate Highway 5 and California Highway 99 over California Highway 99 to Sacramento, Calif., thence over Interstate Highway 80 to San Francisco, and return over the same route, serving all intermediate points;

(16) Between Sacramento, Calif., and Reno, Nev., (a) over Interstate Highway 80, serving all intermediate points, and (b) from Sacramento over U.S. Highway 50 to junction U.S. Highway 395, and thence over U.S. Highway 395 to Reno, and return over the same route, serving all intermediate points;

(17) Between Los Angeles, Calif., and the junction of U.S. Highways 50 and 395 near Carson City, Nev., from Los Angeles over Interstate Highway 10 to San Bernardino, Calif., and thence over U.S. Highway 395 to its junction with U.S. Highway 50 near Carson City, and return over the same route, serving all intermediate points;

(18) Between the junction of Interstate Highways 5 and California Highway 14 and the junction of California Highway 14 and U.S. Highway 395, over California Highway 14, serving all intermediate points;

(19) Between Amarillo, Tex., and San Bernardino, Calif., from Amarillo over U.S. Highway 66 to Barstow, Calif., thence over U.S. Highway 66 to San Bernardino, Calif., and return over the same route, serving no intermediate points and serving Barstow for the purpose of joinder only; and

(20) Between Barstow, Calif., and the junction of California Highway 58 and Interstate Highway 5, over California Highway 58, serving no intermediate points and serving Barstow, the junction of California Highway and U.S. Highway 395, Bakersfield, and the junction of California Highway 58 and Interstate Highway 5 for the purpose of joinder only, restricted in routes (1) through (20) against the transportation of shipments having both an origin and a destination located on or west of a line extending from Galveston, Tex., over Interstate Highway 45 to junction Interstate Highway 30, thence over Interstate Highway 30 to junction Interstate Highway 40, thence over Interstate Highway 40 to Memphis, Tenn., thence over Interstate Highway 55 to Chicago, Ill., thence along the west bank of Lake Michigan to its intersection with Interstate Highway 75, and thence along Interstate Highway 75 to the international boundary line between the United States and Canada at Sault Ste. Marie, Mich.

EXHIBIT CC

David Ortiz Radio Corp. v. *F.C.C.*, 941 F.2d 1253

If the parties still are not satisfied, they may reassert their arguments in any subsequent petitions for review.

III. Conclusion

We affirm the Commission's rulings on price discrimination in all respects, but reverse its findings on anticompetitive effect and remand both orders for further proceedings consistent with this opinion. The petitions for review in Nos. 90–1236 and 90–1515 are denied; the petitions in Nos. 90–1369 and 90–1566 are denied in part and granted in part.

So ordered.

DAVID ORTIZ RADIO CORPORATION, Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

Ramon Rodriguez and Associates, Incorporated, Intervenor.

No. 90–1412.

United States Court of Appeals, District of Columbia Circuit.

Argued April 22, 1991.

Decided Aug. 20, 1991.

Competitor appealed from order of the Federal Communications Commission (FCC) granting broadcast license application. The Court of Appeals, Buckley, Circuit Judge, held that the FCC had failed to satisfactorily explain its refusal to inquire into allegations that applicant had concealed postapplication transmitter site problems and that applicant's co-owner had committed abuse of process by impersonating an FCC inspector.

Reversed and remanded.

1. Telecommunications ⇐414

Before the Federal Communications Commission (FCC) will hold a hearing on broadcast application, dispute must be clearly and adequately alleged, it must be factual, and it must rise to the level of a substantial and material issue. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

2. Telecommunications ⇐424

In reviewing denial by the Federal Communications Commission (FCC) of requested hearing, Court of Appeals plays only a limited role, but will not hesitate to intervene where agency decision appears unreasonable or bears inadequate relation to the facts on which it is purportedly based. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

3. Telecommunications ⇐385

Applicant for broadcast license must have reasonable assurance that transmitter site specified in its application will be available, but standard is liberal one satisfied by some clear indication from landowner that he is amenable to entering into a future arrangement with applicant on terms to be negotiated, and where landowner is a government agency, its mere willingness to entertain a request for use of the land will suffice.

4. Telecommunications ⇐413

Applicant for broadcast license who will be disqualified for misrepresentation only upon substantial evidence of intent to deceive.

5. Telecommunications ⇐397

Discrepancy between broadcast license applicant's representations of site availability were insufficient to warrant finding of misrepresentation as to reasonable assurance of transmittal site, as a ground for rejection of application.

6. Telecommunications ⇐414

The Federal Communications Commission (FCC) has substantial discretion in act-

ing on a motion for summary decision, and statutory hearing requirement does not vouchsafe an inalienable right to cross-examination or surrebuttal. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

7. Telecommunications ⇐414

The Federal Communications Commission (FCC) did not behave arbitrarily or capriciously in summarily dismissing without hearing issue of whether one of three competing applicants for broadcast license had misrepresented reasonable assurance of availability of transmitter site, where competitor neither submitted affidavit nor explained its failure to do so, but merely suggested that applicant's assertions were incomplete and uncorroborated and that applicant had modified his story in a suspicious fashion. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

8. Telecommunications ⇐413

Violation of regulation concerning broadcast applicant's responsibility for continuing accuracy and completeness of information furnished in pending application is disqualifying only if evidence indicates that applicant intended to conceal information from the Federal Communications Commission (FCC) or if reporting violations are so numerous and serious as to indicate irresponsibility.

9. Telecommunications ⇐413

The Federal Communications Commission (FCC) may treat even the most insignificant willful misrepresentation as disqualifying a broadcast applicant.

10. Telecommunications ⇐414

In light of plausible evidence that broadcast applicant may have willfully withheld information from the Federal Communications Commission (FCC) concerning unavailability of transmitter site designated in its application, failure of the FCC to address the issue was arbitrary and capricious. Communications Act of 1934, § 309(e), 47 U.S.C.A. § 309(e).

11. Telecommunications ⇐414

Peremptory dismissal by the Federal Communications Commission (FCC) of abuse-of-process issue involving alleged impersonation of an FCC inspector by a co-owner of broadcast applicant was arbitrary and capricious where based on grounds that the accusation involved alleged criminal conduct unrelated to licensing process that had not resulted in conviction, that person allegedly perpetrating the impersonation was only a 1% owner of the applicant, and that the allegation was flatly denied by the applicant and his statement was supported by a third person.

Appeal from an Order of the Federal Communications Commission.

Robert A. DePont, Washington, D.C., for appellant.

Sue Ann Kanter, Counsel, F.C.C., with whom Robert L. Pettit, Gen. Counsel, F.C.C., and Daniel M. Armstrong, Associate Gen. Counsel, F.C.C., Washington, D.C., were on the brief, for appellee. Roberta L. Cook, Counsel, F.C.C., Washington, D.C., also entered an appearance, for appellee.

Christopher D. Imlay, Washington, D.C., was on the brief, for intervenor.

Before BUCKLEY, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

During preliminary proceedings for a broadcast license, two applicants accused a third of potentially disqualifying skullduggery involving misrepresentation, concealment of material facts, and abuse of process. Without convening hearings, the Federal Communications Commission found the allegations to be without merit, and it ultimately awarded the license to the alleged wrongdoer. Because the FCC skated past the accusers' central arguments and misapplied its own policy concerning character qualifications, we remand.

I. Background

This proceeding involves the award of a construction permit for a newly authorized

FM radio channel serving southwest Puerto Rico. The first applicant, David Ortiz Radio Corporation ("Ortiz"), proposed to transmit from Cerro Guaniquilla. Ortiz had actually secured permission to use a hill about half a mile from Cerro Guaniquilla. Upon discovering the error and the unavailability of the originally designated site, Ortiz located an alternative site and filed an amended application. The FCC found no intent to deceive and accepted the amendment. The Commission ultimately granted the license to Ramon Rodriguez & Associates, Inc. ("RRAI").

Ortiz challenges the licensing decision on three bases: (1) In its license application, RRAI falsely certified that it had reasonable assurance of a transmitter site; (2) RRAI subsequently concealed its lack of a site from the Commission for over seven months; and (3) seeking information with which to discredit Ortiz, an RRAI principal abused the Commission's process by posing as an FCC official.

A. Transmitter Site-related Charges

On December 8, 1982, RRAI applied for the license and, like Ortiz, listed Cerro Guaniquilla as its transmitter site. In March 1983, RRAI submitted an amendment in which it reaffirmed its intention to transmit from that site; it withdrew that amendment in July and submitted an amendment listing a different site in August. These facts led other applicants to charge RRAI with misrepresenting the status of its transmitter site in the application and with concealing its site problems from the FCC thereafter.

One of the applicants, F.M. Minority Broadcasting, filed a Petition to Enlarge the Issues in July 1987, in which it moved that the Commission consider the misrepresentation charge and determine in the light of it whether RRAI had "the minimum qualifications of character" to receive a license. Joint Appendix ("J.A.") 172–73. RRAI responded with an affidavit from its principal shareholder, Ramon Rodriguez, dated July 21, 1987 ("July 1987 affidavit"). He explained that the application listed Cerro Guaniquilla because he had learned that it was the site selected by Ortiz, understood that it belonged to the government of Puerto Rico, and believed "to the best of my layman's knowledge [that] if the land was government owned and available to Mr. Ortiz, it was to be available to us also." J.A. 192.

According to the affidavit, Rodriguez applied for a land-use permit and paid a filing fee at the Puerto Rico Department of Natural Resources in November 1982. In a letter dated December 3, the agency responded that the government did not own the land. From additional inquiries, Rodriguez learned that the land actually belonged to a different government agency, the Conservation Trust of Puerto Rico; the Trust, however, denied Rodriguez's request to erect a transmitter tower. The affidavit states that RRAI

> [i]mmediately ... moved to start looking for another site which, after many efforts [on] our part, we found in "Penones de Melones"; and [on] June 14, 1983 we received a letter from the owners telling us that they were in agreement to rent the land to us....
>
> We then, on June 29, 1983, prepared and filed an amendment to change the original site before the Federal Communication[s] Commission, and it is the one that we have at this moment.

J.A. 193.

F.M. Minority termed the RRAI filing "a litany of misrepresentation and lack of candor." J.A. 210. It noted, among other things, that RRAI had not informed the FCC of its new site on June 29, 1983, as the Rodriguez affidavit indicated. Although the engineering documents bore that date, the amendment was not submitted until August 26. F.M. Minority had originally sought a hearing on whether the RRAI application contained a misrepresentation; now, in light of RRAI's tardiness in disclosing its site problems, it amended the petition to include the issue of post-application concealment as well.

In February 1988, the ALJ added the misrepresentation issue but said nothing about concealment. J.A. 239. F.M. Minority submitted a "motion for clarification"

that asked about the concealment issue. The motion contended that RRAI had known it had been without a site since early December 1982, but had waited eight months before apprising the FCC of the fact, and that during that period, RRAI had submitted two documents to the FCC—a March 1983 amendment and a July letter withdrawing it—that continued to list the original location as the proposed transmitter site. In light of these communications, F.M. Minority urged the FCC to investigate whether RRAI had "misrepresented, concealed or was lacking in candor," J.A. 253, and whether RRAI had violated an FCC regulation requiring applicants to inform the Commission "as promptly as possible and in any event within 30 days" if the information in the pending application "is no longer substantially accurate and complete in all significant respects," 47 C.F.R. § 1.65(a) (1990). On April 13, 1988, the ALJ denied the motion as an untimely attempt to enlarge the issues. He also noted that the facts demonstrated "no undue delay by Rodriguez in finding and amending to a new site once he discovered that the government site was unavailable." J.A. 415.

Although the ALJ had refused to add the concealment issue, the misrepresentation issue remained. Rodriguez gave a deposition on April 26 and filed an affidavit on May 2 ("May 1988 affidavit"). Whereas in his earlier affidavit he had spoken of his "layman's knowledge" about the availability of a government-owned site, he now said he had consulted an attorney. He also disclosed when he first learned there was a problem with the Guaniquilla site, and when he was advised of its unavailability: He said he had received the December 3, 1982, letter from the Department of Natural Resources disclaiming government ownership of the property on December 8—coincidentally, the day that the RRAI application was filed with the FCC in Washington—and that the Conservation Trust had denied him the site on January 10, 1983. After discovery but before the planned hearing, RRAI moved for summary judgment on the issue. In July 1988, the ALJ granted the motion. He said he found no evidence that RRAI had intended to deceive the FCC and noted that intent is a necessary element of misrepresentation.

Having disposed of the misrepresentation issue, and F.M. Minority having withdrawn its application, the ALJ proceeded with a comparison of the remaining applicants, RRAI and Ortiz. Although the ALJ found that both were qualified, he awarded the license to RRAI because Ortiz already owned an AM station in the area. *Ramon Rodriguez,* 4 F.C.C. Rcd. 370, 374–75 (1989).

On administrative appeal, Ortiz contested the ALJ's handling of the misrepresentation and concealment issues. The Review Board affirmed both rulings on the ground that no evidence showed that RRAI had acted in bad faith. 4 F.C.C. Rcd. 6817, 6817–18 (Rev.Bd.1989). The Board added that RRAI's delay in reporting its site problems might once have resulted in a comparative demerit, but the FCC had stopped considering issues of character in its comparative analyses; thus "this option is no longer available to us." *Id.* at 6818 (citing *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 F.C.C.2d 1179, 1230–32 (1986) (*"Character Qualifications"*), *amended,* 5 F.C.C. Rcd. 3252 (1990)). The FCC denied review without discussing the site-related issues. 5 F.C.C. Rcd. 4041 (1990).

B. Abuse of Process Charge

In April 1988, Ortiz filed a motion to add an abuse-of-process issue against RRAI. Of the allegations in the motion, one is preserved on appeal: Ortiz's claim that Juan Rodriguez, a one percent owner of RRAI and the son of principal owner Ramon Rodriguez, had tried to pass himself off as an FCC inspector.

Ortiz submitted an affidavit by Carlos Ortiz Postigo, owner of Carlitos Photo Store, who gave the following account. In February 1988, Juan Rodriguez asked him to photograph the transmitter used by Ortiz's AM station. When Rodriguez admitted that he did not have Ortiz's permission, the photographer refused. Rodriguez later returned and said that he was from the

FCC and wanted to ask about the Ortiz station and about an FM station licensed to the daughter of Ortiz Corporation president David Ortiz. The photographer demanded official identification and, when Rodriguez could not produce any, refused to answer his questions.

RRAI responded with an affidavit from Juan Rodriguez, who swore that he had never identified himself as an FCC employee, that he would never do such a thing because it would tarnish his "sound and moral image" as a singer in "the famous Andino's Trio," that he had in fact announced that he was representing RRAI and that he was a member of the renowned trio, and that the photographer had recognized him. J.A. 432. RRAI also submitted the affidavit of Juan Esquerdo, who said that he had accompanied Rodriguez to the photographer's shop and that the Rodriguez affidavit was accurate. Ortiz responded with a second affidavit from the photographer, who stood by his original account and said he had never heard of Andino's Trio.

The FCC refused to add the issue. The ALJ noted that no extrinsic proof had been offered and concluded that "it would serve no purpose to explore" the matter because the conflicting affidavits amounted to a standoff. J.A. 598. The Review Board affirmed. It stressed that impersonating an FCC agent was a crime, and that under the Commission's *Character Qualifications* policy, such a charge would not be considered absent a conviction. 4 F.C.C. Rcd. at 6818. The Board also noted that Juan Rodriguez was a minor shareholder, that he denied the allegation, and that his account was supported by a third party. *Id.* The Commission denied review without discussing the issue. 5 F.C.C. Rcd. at 4041.

II. Discussion

A. Legal Standards

[1, 2] The Communications Act provides:

> If ... a substantial and material question of fact is presented ..., [the Commission] shall formally designate the application for hearing on the ground or reasons then obtaining.... Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate.

47 U.S.C. § 309(e) (1988). Before the FCC will hold a hearing, the "dispute must be clearly and adequately alleged, it must be factual, and it must rise to the level of a substantial and material issue." *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 674 (D.C.Cir.1985); *see also Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394–95 (D.C.Cir.1985). In reviewing the FCC's denial of a requested hearing, we play only a "limited" role, for "the Commission's discretion and expertise [are] paramount" in this sphere. *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C.Cir. 1987) (internal quotes and citations omitted). "We will not, however, hesitate to intervene where the agency decision appears unreasonable or bears inadequate relation to the facts on which it is purportedly based." *California Public Broadcasting*, 752 F.2d at 675.

B. The Misrepresentation Issue

The first issue presented was whether RRAI's application had misrepresented the status of its transmitter site. The ALJ added the issue but resolved it in RRAI's favor without a hearing, and the Review Board affirmed. Ortiz argues that this disposition is erroneous both substantively and procedurally.

1. Misrepresentation of reasonable assurance

[3, 4] An applicant must have "reasonable assurance" that the transmitter site specified in its application will be available. *Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1463 (D.C.Cir.1989). The standard, "a liberal one," is satisfied by

> some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated, and that

> he would give notice of any change of intention.

Elijah Broadcasting Corp., 5 F.C.C. Rcd. 5350, 5351 (1990). Where the landowner is a government agency, its "mere willingness ... to entertain a request for use of the land" will suffice. *Alden Communications Corp.*, 3 F.C.C. Rcd. 3937, 3938 (1988). An applicant will be disqualified for misrepresentation only upon "substantial evidence of an intent to deceive." *Armando Garcia*, 3 F.C.C. Rcd. 1065, 1067 (Rev. Bd.), *rev. denied*, 3 F.C.C. Rcd. 4767 (1988).

In affirming the ALJ's summary decision, the Review Board explained:

> [I]t appears from Rodriguez's uncontradicted affidavit and sworn deposition testimony that he proceeded in good faith in specifying a site on the basis of his knowledge that Ortiz had selected the same site, on his conversations with government personnel, on advice from legal counsel, and on his payment of a filing fee. Only after these steps were taken and the application was filed did he learn of the site's unavailability.

4 F.C.C. Rcd. at 6817. The Board added that absent evidence of bad faith, "no genuine issue of misrepresentation ... remained to be tried." *Id.* at 6817–18.

[5] On appeal, Ortiz notes that Rodriguez initially spoke of his "layman's knowledge" about government permits, but later claimed that he had consulted a lawyer. Although the Board mentioned this consultation, along with the other steps Rodriguez said he had taken before filing, we have no reason to believe that the Board relied on this particular assertion in finding that RRAI had acted in good faith. The Board was certainly aware of the discrepancy between Rodriquez's first and final representations, and apparently did not find it significant. Nor do we. As Ortiz has given us no better basis for overturning the Commission's findings and conclusions, we leave this portion of the decision undisturbed.

2. Summary dismissal

[6, 7] Ortiz also faults the ALJ for dismissing the issue without a hearing. To defeat a motion for summary decision, a petitioner

> may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing[; or] that he cannot, for good cause, present by affidavit or otherwise facts essential to justify his opposition[;] or that summary decision is otherwise inappropriate.

47 C.F.R. § 1.251(b). The FCC has substantial discretion in acting on a motion for summary decision; the statutory hearing requirement "does not vouchsafe an inalienable right to cross-examination or surrebuttal." *Cellular Mobile Sys. v. FCC*, 782 F.2d 182, 197 (D.C.Cir.1985).

Ortiz neither submitted an affidavit nor explained its failure to do so; it merely suggested that the RRAI assertions were incomplete and uncorroborated and that Rodriguez had modified his story in a suspicious fashion. This was not enough for the Review Board, which concluded that "Ortiz's general objections and denials, unsupported by affidavit(s), ... did not undermine or raise serious question as to Rodriguez's *bona fides*," 4 F.C.C. Rcd. at 6817. Ortiz relies heavily on *California Public Broadcasting Forum v. FCC*, but the movant there, unlike Ortiz, produced affidavits and documentary evidence supporting its version of the disputed facts, *see* 752 F.2d at 676–77. Ortiz has failed to demonstrate that the Commission behaved arbitrarily or capriciously.

C. The Concealment Issue

On the evidence before it, the FCC reasonably concluded that RRAI's actions concerning the transmitter site were above board up to and including the time that it submitted its license application. RRAI's post-application behavior, however, is another matter.

On December 8, 1982, the day that RRAI filed its application, it could reasonably be-

lieve that Cerro Guaniquilla would be available. But by day's end, according to his May 1988 affidavit, Rodriguez had received the letter from the Department of Natural Resources advising him (mistakenly) that the property was privately owned. Therefore, as of that moment, RRAI had no assurance of the site's availability. On January 10, 1983, the Conservation Trust denied RRAI the use of the property. Thus, RRAI's belief in the site's availability, reasonable at daybreak on December 8, became less plausible by dusk and untenable on January 10.

When he ruled that "there was no undue delay by Rodriguez in finding and amending to a new site once he discovered that the government site was unavailable," J.A. 415, the ALJ apparently did not comprehend the duration of RRAI's delay—from January 10 to August 26, seven and one-half months. In an earlier ruling, the ALJ had said that RRAI "was not advised of [Cerro Guaniquilla's] unavailability until June of 1983," J.A. 239, which was a plausible interpretation of Rodriguez's July 1987 affidavit. *See* excerpt quoted above at page 1255. The ALJ presumably continued to harbor this misconception when, on April 13, 1988, he denied the motion for clarification on the ground of "no undue delay." This is understandable, as it was not until thirteen days after that ruling that Rodriguez first acknowledged, in a deposition, that the Conservation Trust had denied his request as early as "January or February" 1983, not June. (He confirmed the January 10 date the following week in his May 1988 affidavit.)

The Review Board affirmed the ALJ on a different rationale. After noting that the ALJ had found no undue delay, the Board said:

> We agree with the ALJ that no substantial basis for a non-reporting issue was established. While Rodriguez did not report the loss of his site within thirty days (required by 47 C.F.R. § 1.65), ... no evidence was submitted to show that he acted deceptively or proceeded in bad faith either before or after he learned that his site was unavailable. In these circumstances, the failure to timely report would have at one time resulted, perhaps, in a comparative demerit, but this option is no longer available to us. *See Character Qualifications*, 102 F.C.C.2d 1179, 1230–1232 (1986). Absent anything other than speculation and surmise to support Ortiz's claim that the omission was intended to deceive, we conclude that the ALJ's ruling was correct.

4 F.C.C. Rcd. at 6818. While the Board did not indicate that it recognized the ALJ's factual error, we may assume that it did, as Ortiz recited the disclosures contained in Rodriguez's May 1988 affidavit in its pleadings. Thus, the final agency action before us appears to be this: the Review Board's conclusion that no evidence of an intent to deceive underlies RRAI's seven-month delay.

[8] Section 1.65, the reporting requirement to which the Board referred, provides:

> Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application.... [W]henever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

47 C.F.R. § 1.65(a). A section 1.65 violation is disqualifying only if evidence indicates that the applicant intended to conceal the information from the Commission, or if the reporting violations are so numerous and serious as to indicate irresponsibility. *See Valley Broadcasting Co.*, 4 F.C.C. Rcd. 2611, 2618 (Rev. Bd.1989).

[9, 10] Had RRAI remained silent between January 10, 1983, when it was denied the use of Cerro Guaniquilla, and August 26, when it identified its new site by amendment, any charge of deliberate con-

cealment might justly have been dismissed as mere "speculation and surmise." During that period, however, RRAI spoke twice. On March 18, 1983, about two months after Rodriguez had learned that the site was unavailable, RRAI filed an amendment. It included an engineering statement, signed and certified as accurate by RRAI's technical consultant, that listed Cerro Guaniquilla as the transmitter location. The amendment was signed by an RRAI partner, who thereby "certif[ied] that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith." J.A. 101. And it was accompanied by a letter from RRAI's attorney, who declared that the amendment specified "the same transmitter site" as the application. J.A. 96. Then, on July 7, 1983, RRAI informed the FCC that the March 18 amendment "is hereby withdrawn, and the application as originally filed ... is to be processed." J.A. 116. This letter implies what the earlier communication stated—that Cerro Guaniquilla remained RRAI's transmitter site—and it was submitted nearly six months after RRAI learned otherwise.

We believe that these two filings potentially met the Commission's standard of "suitable evidence of an intent to conceal pertinent information from the Commission," *Valley Broadcasting*, 4 F.C.C. Rcd. at 2618, such that disqualification under section 1.65 was possible. As we have noted before, "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity" ordinarily suffices to demonstrate fraudulent intent. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C.Cir.1980).

As affirmative misstatements, moreover, the two filings also reflected on the applicant's character. At the time, the Commission limited its interest in character to matters "clearly relevant to the licensing process." *Character Qualifications*, 102 F.C.C.2d at 1181. The Commission expressed particular concern over willful misrepresentation: It "not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission." *Id.* at 1209. Accordingly, the FCC may "treat even the most insignificant misrepresentation as disqualifying," for " '[t]he fact of concealment may be more significant than the facts concealed.' " *Id.* at 1210 & n. 77 (quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 227, 67 S.Ct. 213, 215, 91 L.Ed. 204 (1946)). The FCC has disqualified several applicants for such offenses. *See 62 Broadcasting, Inc.*, 4 F.C.C. Rcd. 1768, 1774 (Rev. Bd.1989) (citing cases), *rev. denied*, 5 F.C.C. Rcd. 830 (1990).

Thus, the RRAI amendment and the letter withdrawing it offer plausible evidence that the applicant may have willfully withheld information from the Commission, thereby raising serious question as to "its basic qualifications to be a licensee." *Character Qualifications*, 102 F.C.C.2d at 1231. These filings were vigorously and repeatedly brought to the FCC's attention—by F.M. Minority before the ALJ, and by Ortiz before the Review Board and the Commission—and yet, astonishingly, no FCC decisionmaker so much as mentioned them. Much as we defer to the Commission's determination that a factual dispute is too insubstantial to require a hearing, "the determination must at least be *made*." *Citizens for Jazz*, 775 F.2d at 398 (emphasis in original). As the FCC evaded the requisite determination by ignoring important arguments and evidence, its decision in this regard is arbitrary and capricious, *see NRDC v. EPA*, 822 F.2d 104, 111 (D.C.Cir. 1987), and must be remanded.

D. The Abuse of Process Issue

[11] Here we confront another question of character: the allegation that an RRAI co-owner, Juan Rodriguez, impersonated an FCC inspector. The Review Board affirmed the ALJ's refusal to add this issue. The Board stressed that,

> insofar as Ortiz contends that the alleged impersonation would constitute a criminal violation of 18 U.S.C. 912, we observe that Ortiz has not even asserted that this matter was the subject of a criminal complaint, investigation, indictment, trial, or

judgment of any sort, let alone a conviction. In pertinent part, it is the Commission's general policy not to take cognizance of misconduct involving alleged criminal activity unless it is finally adjudicated by a court.

4 F.C.C. Rcd. at 6818.

Once again, the Review Board misconstrued the allegation and as a consequence misapplied FCC policy. It is true that the Commission "will not take cognizance of *non-FCC* misconduct involving criminally fraudulent misrepresentations ... unless it is adjudicated." *Character Qualifications*, 102 F.C.C.2d at 1205 (emphasis added). It is also true, however, that "such misconduct as ... harassment of opposing parties, which threatens the integrity of the Commission's licensing processes, will ... continue to be considered as bearing on character"; the FCC terms this misbehavior "abuse of process." *Id.* at 1211. Ortiz, while mentioning the possibility of criminal liability, argued that the impersonation amounted to "an abuse of the Commission's process ... intended to impede, frustrate or obstruct the prosecution of the Ortiz application." J.A. 671. Nevertheless, the Board treated the accusation as alleging criminal conduct unrelated to the licensing process.

In addition to the fact that the impersonation charge had not been criminally adjudicated, the Review Board cited two other points in support of its ruling. First, it noted that the allegation concerned "a very minor Rodriguez principal (Juan Carlos Rodriguez Maldonado, merely a 1% equity owner of the applicant)." 4 F.C.C. Rcd. at 6818. Rodriguez's equity interest, however, belies the magnitude of his links to RRAI. He is the son of the principal owner, Ramon Rodriguez, and he expected to become the station's full-time news director. Moreover, Juan Rodriguez admitted in an affidavit that on one occasion he initially concealed his identity while conducting an investigation on RRAI's behalf. In an effort to determine whether David Ortiz secretly controlled the station licensed to his daughter, Rodriguez visited the station and requested its public file; when asked what company he represented, he replied that he represented none, but later identified himself as "Juan Carlos Rodriguez, of Ramon Rodriguez & Associates." J.A. 491–92. In the affidavit, Rodriguez revealed that he had undertaken this mission on his father's instructions. In light of this episode, it is hardly outlandish to suggest that the other investigation, in which the young Rodriguez allegedly posed as an FCC inspector, was also instigated by his father.

As the other factor against adding the issue, the Review Board noted that the allegation "was flatly denied by the Rodriguez principal, and his statement was supported by a third person." 4 F.C.C. Rcd. at 6818. The ALJ similarly remarked that "[s]ince the testimony submitted in support of the motion is contradicted, it would serve no useful purpose to explore because the standoff can never be resolved." J.A. 598. These statements suggest a disquieting laxity on the Commission's part. A hearing, with its cross-examination and opportunities to observe the demeanor of witnesses, can frequently resolve a conflict that appears irresolvable on paper; indeed, determining which of several conflicting accounts is accurate "is precisely the function of an evidentiary hearing." *California Public Broadcasting*, 752 F.2d at 680.

The Commission may have valid reasons for refusing to inquire into the abuse-of-process charge, but it has thus far failed to articulate them. We must therefore find that the Commission's peremptory dismissal of the abuse-of-process issue was arbitrary and capricious.

III. Conclusion

The FCC acted within its discretion in concluding, after discovery but before a hearing, that RRAI did not misrepresent its site status when applying for the license. The Commission failed, however, to explain satisfactorily its refusal to inquire into two other allegations: that RRAI had concealed its post-application site problems from the FCC by affirmative misstatement as well as by silence; and that Juan Rodriguez, acting on behalf of RRAI, abused the

Commission's process by impersonating an FCC inspector. Accordingly, we reverse these rulings and remand for further proceedings consistent with this opinion.

So ordered.

BENTSON CONTRACTING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent (Two Cases).

Nos. 89-1691, 90-1473.

United States Court of Appeals, District of Columbia Circuit.

Argued April 25, 1991.

Decided Aug. 27, 1991.

Unions filed petitions seeking certification as exclusive bargaining agent of workers each traditionally represented under expired prehire agreements. The National Labor Relations Board (NLRB) issued orders certifying bargaining units of laborers, operating engineers, and truck drivers, and upheld unfair labor practice charges filed by unions following union election and certification. Employer petitioned for review and NLRB cross-applied for enforcement. The Court of Appeals, Randolph, Circuit Judge, held that bargaining unit determinations were arbitrary, capricious, and otherwise contrary to law.

Petitions granted and cross-applications denied.

1. Labor Relations ⇐516

National Labor Relations Board (NLRB) reasonably interpreted limitations provision in NLRA to create new six-month period within which to bring unfair labor practice charges for employer's subsequent refusal to bargain within one year from date of certification, on ground that each refusal to bargain was independent unfair labor practice, and that interpretation was entitled to deference. National Labor Relations Act, § 10(b), as amended, 29 U.S.C.A. § 160(b).

2. Labor Relations ⇐203

National Labor Relations Board (NLRB) has wide discretion in determining appropriate bargaining unit, and reviewing court must generally defer to its judgment that particular unit is appropriate. National Labor Relations Act, § 9(b), as amended, 29 U.S.C.A. § 159(b).

3. Labor Relations ⇐202

Central test for designation of appropriate bargaining unit is whether workers share "community of interest," that is, "substantial mutual interests in wages, hours, and other conditions of employment." National Labor Relations Act, § 9(b), as amended, 29 U.S.C.A. § 159(b).

4. Labor Relations ⇐202

In establishing separate bargaining units for truck drivers and for laborers, the National Labor Relations Board (NLRB) improperly disregarded substantial overlap of employees resulting from that unit determination. National Labor Relations Act, § 9(a, b), as amended, 29 U.S.C.A. § 159(a, b).

5. Labor Relations ⇐202

Placing same job category in two bargaining units, with distinct possibility that employees would end up having to join two unions to hold one job, could not be considered appropriate, in reviewing designation of bargaining units by the National Labor Relations Board (NLRB). National Labor Relations Act, § 9(a, b), as amended, 29 U.S.C.A. § 159(a, b).

6. Labor Relations ⇐202

While historical employment practices would ordinarily be best measure of actual work divisions, and would be proper means of determining whether employees share particular "community of interest," historical practices are less pertinent to determi-

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WMOZ, Inc. v. *FCC*, 344 F.2d 197

of time between the cessation of the snowfall and the time of the injury.[3]

No exceptions were taken to the instructions as given and no error having appeared, the judgment is

Affirmed.

WMOZ, INC., and Edwin H. Estes, Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee.

No. 18742.

United States Court of Appeals
District of Columbia Circuit.

Argued Feb. 1, 1965.

Decided Feb. 25, 1965.

Proceeding respecting radio broadcasting licenses. The Federal Communications Commission entered orders denying application for renewal of one standard broadcast station license and revoking the license for another station and the applicants appealed. The Court of Appeals held in view of claim that one applicant was victim of conspiratorial competitors and others who sought to drive him out of radio station business, public interest considerations required that case be remanded to the end that a supplemental record might be compiled.

Remanded for further proceedings.

Telecommunications ⇐426

In view of claim that one applicant was victim of conspiratorial competitors and others who sought to drive him out of radio station business, public interest considerations required that case involving order of Federal Civil Communications Commission denying renewal of standard broadcast license at one station and revoking license of individual for standard broadcast station at another location be remanded to the end that a supplemental record might be compiled.

Mr. Glenn A. Mitchell, Washington, D. C., for appellants.

Mr. Ernest O. Eisenberg, Counsel, F. C. C., with whom Messrs. Henry Geller, Gen. Counsel, and Daniel R. Ohlbaum, Deputy Gen. Counsel, F. C. C., were on the brief, for appellee. Mr. John H. Conlin, Counsel, F. C. C., also entered an appearance for appellee.

Before DANAHER, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM:

Here the only question of substance involves the Commission's refusal to reopen the record for the taking of evidence which the appellants claimed was newly discovered and of decisional significance.

The appellants in this court have challenged the Commission's Decision and Order released February 4, 1964 denying the application for renewal of the standard broadcast station license of WMOZ, Inc. at Mobile, Alabama, revoking the license of Estes for standard broadcast station WPFA at Pensacola, Florida, and denying the appellants' petition to reopen the record for the taking of additional evidence. Appellants further have appealed from the Commission's Memorandum Opinion and Order released June 5, 1964 denying the appellants' petition for reconsideration and for further oral argument. The record shows that a Hearing Examiner had concluded that Estes as owner of 99 per cent of the stock of WMOZ, Inc. had disqualified himself and his corporation from holding a Commission authorization. The available evidence has also demonstrated, he con-

3. Smith v. District of Columbia, 89 U.S. App.D.C. 7, 189 F.2d 671 (1951); cf. Campbell v. District of Columbia, 100 U.S.App.D.C. 120, 125, 243 F.2d 226, 231 (1957).

cluded, that Estes lacked the qualifications to be the licensee of WPFA. The Commission approved its Examiner's finding that Estes had deliberately falsified certain records and had testified falsely with respect to their preparation. The Commission additionally concluded that Estes, having knowingly and willfully submitted false information to the Commission, lacked the necessary character qualifications to continue as a licensee of the Commission. Thus it was decided that the WMOZ license should not be renewed and that his individual license for station WPFA should be revoked. Without more, it would appear that at the time of its orders based upon the untrustworthiness [1] of Estes, the Commission's action found overwhelming support in the record.

However, some months before the Commission's February, 1964 order was entered, Estes moved to reopen the record so that he might file two affidavits executed by one Ray and one Foster who claimed knowledge of important facts. If believed, the testimony of these affiants might have gone far toward undermining the basis for the Commission's conclusions as to Estes. It might have been made to appear that he was the victim of conspiratorial competitors and others who sought to drive Estes out of business that they might acquire his radio properties. Certainly the record is replete with charges and recriminations. Some months after oral argument, the Commission *en banc* denied the motion.[2]

We think in view of the nature of the claims, public interest considerations require that this case be remanded to the end that a supplemental record may be compiled before the Hearing Examiner, and that Ray and Foster should be called to testify. In the light of their testimony, further evidence may be received in refutation or corroboration as the case may be. We intimate no opinion as to what weight the Commission shall ultimately accord to the testimony adduced at the supplemental hearing, nor do we express a view as to what the Commission's ultimate action should be if it should decide that false testimony has been adduced and that the Commission's processes have been abused. It is enough to observe that a full record, compiled as has been suggested, may advance the interests of justice.

We have considered other contentions with respect to various Commission rulings and deem them to be without merit.

Remanded for further proceedings consistent with this opinion.

1. Cf. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 227–228, 67 S.Ct. 213, 91 L.Ed. 204 (1946).

2. Only four Commissioners participated in the decision. More than 14 months elapsed between the date of the report of the Hearing Examiner and the Commission's ultimate action.

Ursula GRIFFIN et al., Appellants,

v.

Robert F. KENNEDY, Attorney General, as Successor to the Alien Property Custodian, Appellee.

No. 18505.

United States Court of Appeals
District of Columbia Circuit.

Argued Jan. 28, 1965.

Decided Feb. 25, 1965.

Action was brought to recover property seized under the Trading with the Enemy Act. The United States District Court for the District of Columbia, Alexander Holtzoff, J., entered a judgment granting the cross motion of the United States for partial summary judgment, and the plaintiffs appealed. The Court of Appeals held that where stipulation stating that plaintiffs "resided" in enemy territory throughout the war, also

EXHIBIT EE

Wilkett v. *I.C.C.*, 710 F.2d 861

challenging the protest strategy altogether. But even assuming that appellants were responsible for how RECO pursued its strategy, the court reached its conclusion about appellants' role only after sifting through conflicting assertions and affidavit testimony, and only after resolving genuine issues of fact which should have precluded summary judgment.

More fundamentally, following remand the district court should recognize that Neumann's abuse of process claim is not based on the particular steps RECO took. Rather, appellants' claim is based on the overall legitimacy of RECO's strategy of challenging Neumann's patent. Neumann contends that RECO's reasons were unfounded, and of course RECO did ultimately lose. It is hard to see how equity could be served by preventing appellants from challenging RECO's strategy.

Reversed and Remanded for Further Proceedings.

James WILKETT, d/b/a Wilkett Trucking Company, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents.

No. 82-1373.

United States Court of Appeals, District of Columbia Circuit.

Argued May 6, 1983.

Decided June 24, 1983.

Petition was filed for review of order of Interstate Commerce Commission denying application for expanded motor vehicle common carrier authority. The Court of Appeals held that it was improper to equate fitness of trucking company with that of its proprietor, who had suffered drug and homicide convictions, and that Commission failed to apply its usual standard in judging fitness.

Reversed.

1. Commerce ⇐169

Interstate Commerce Commission's denial of additional motor vehicle common carrier authority because of nontransportational convictions of sole proprietor of license carrier was reviewed under the arbitrary and capricious standard to determine if it was based on a consideration of relevant factors and did not evidence a clear error of judgment. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1).

2. Commerce ⇐85.27(4)

While proprietor's fitness may have been relevant on issue of expanded motor vehicle common carrier authority, primary focus should have been on licensed trucking company's record of operations. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1).

3. Commerce ⇐85.27(4)

Decision of Interstate Commerce Commission denying application for expanded motor vehicle common carrier authority on ground of drug and homicide convictions of the proprietor was reversed for error in equating trucking company's fitness with that of the proprietor and because Commission failed to apply its usual standards in adjudging fitness. Revised Interstate Commerce Act, 49 U.S.C.A. § 10922(b)(1).

to invoke the estoppel, however, must have been an adverse party in the prior proceeding, must have acted in reliance upon his opponent's prior position, and must have acted in reliance upon his opponent's prior position, and must now face injury if a court were to permit his opponent to change positions.... As Professor Pomeroy states, the rule's object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law, unless prevented by the estoppel."
Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir.1980).

Petition for Review of an Order of the Interstate Commerce Commission.

John J. McMackin, Jr., Washington, D.C., for petitioner.

Colleen J. Bombardier, Atty., ICC, Washington, D.C., with whom John Broadley, Gen. Counsel, and Lawrence H. Richmond, Deputy Associate Gen. Counsel, ICC, John J. Powers, III and George Edelstein, Attys., U.S. Dept. of Justice, Washington, D.C., were on the joint brief for respondents. Kathleen M. Dollar, Atty., I.C.C., and Robert B. Nicholson, Atty., U.S. Dep't of Justice, Washington, D.C., also entered appearances for respondents.

Before EDWARDS, Circuit Judge, and McGOWAN and MacKINNON, Senior Circuit Judges.

Opinion for the Court PER CURIAM.

PER CURIAM:

I.

Wilkett Trucking (the Company) began operations in 1975 and received its first Interstate Commerce Commission (Commission) license in 1978. The Company is currently authorized to transport coal from mines in four Oklahoma counties to facilities in eight Texas counties. Although the business is organized as a sole-proprietorship, it has been a Wilkett family operated enterprise throughout.

In March, 1981, the Company applied to the Commission for new, expanded authority to transport coal from all points in Oklahoma to any point in Texas. The Commission ordered a hearing and directed its Office of Consumer Protection to present facts regarding the proprietor's fitness (James Wilkett). The fitness issue arose because on February 12, 1981, Wilkett was convicted of conspiracy to distribute a controlled substance (dilaudid) in violation of 21 U.S.C. § 846 (1976).[1]

1. Wilkett was sentenced to 15 years in prison which he began serving on February 27, 1981. The conviction is on appeal.

At the Commission hearing eight witnesses testified in favor of granting the expanded authority. Their testimony established that Wilkett Trucking was a well-run, highly regarded business which served its customers well. Testimony also revealed that the Company had made conscientious efforts to comply with Commission rules by hiring a compliance consultant and by instituting new internal recordkeeping and administrative procedures. The Office of Consumer Protection introduced only a certified copy of Wilkett's judgment and commitment order. No witness testified in opposition to the grant of authority. Nevertheless the Administrative Law Judge concluded that the proprietor's unfitness, as evidenced by the judgment of conviction, could not be separated from the overall fitness of the company and, therefore, he denied the application. *James Wilkett, d/b/a Wilkett Trucking Co.*, No. MC–121794 (Sept. 22, 1981). (Hereinafter cited as *Wilkett I*).

Wilkett Trucking appealed the decision to Division I of the Commission. The Division adopted the facts as found by the Administrative Law Judge, but reached a different conclusion. The Division found that the applicant, i.e., the Company, was fit and that the proposed expanded service was responsive to public need and would serve a useful public service. Citing Commission precedent, the Division concluded that past willful misconduct was not *per se* a bar to the grant of authority and focused its inquiry upon the business conduct of Wilkett Trucking. The Division found no evidence of disregard for trucking laws and regulations. Recognizing that its duty is to protect the public from misconduct in the trucking industry and not to levy additional punishment upon individuals, the Division concluded that the expanded authority should be granted. However, due to the unique circumstances the Division limited the grant of authority to two years subject to review upon expiration. *James Wilkett, d/b/a Wilkett Trucking Co.*, No. MC–

121794 (Dec. 2, 1981). (Hereinafter cited as *Wilkett II*).

The Commission Office of Compliance and Consumer Assistance (formerly the Office of Consumer Protection) petitioned the full Commission for review of the Division's grant of authority. In its petition the Office informed the Commission that on November 25, 1981, James Wilkett was convicted in Oklahoma state court of second degree murder and sentenced to fifteen years imprisonment.[2] Based upon this new evidence the Commission granted the petition for review and reversed the decision by Division I. Finding that the proprietor's fitness could not be separated from that of the Company, the Commission concluded that Wilkett's convictions demonstrated a disregard for the law indicative of one who is unfit to hold a Commission authorization. *James Wilkett, d/b/a Wilkett Trucking Co.*, No. MC–121794 (Feb. 23, 1982). (Hereinafter cited as *Wilkett III*).

Wilkett filed an appeal with this court. The Commission moved for and was granted remand of the case for the purpose of reconsideration. Upon reconsideration the Commission reached the same conclusion—authority denied. Although it recognized that Wilkett is incarcerated and "does not exercise complete dominion over the operations of Wilkett Trucking," the Commission reaffirmed its earlier conclusion that James Wilkett and the Company are inseparable. *James Wilkett, d/b/a Wilkett Trucking Co.*, No. MC–121794 (Jan. 18, 1983). (Hereinafter cited as *Wilkett IV*).

Wilkett challenges the Commission's denial of additional authority.

II.

[1] The Motor Carrier provisions of the Interstate Commerce Act, 49 U.S.C. § 10922(b)(1) (Supp. V 1981), empower the Commission to grant authority for motor carrier operations "if it finds (1) that the applicant is 'fit, willing, and able properly to perform the service proposed'; and (2) that the service proposed 'is or will be required by the present or future public convenience and necessity.'" *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974).[3] Judicial review of the Commission decisions is under the arbitrary and capricious standard. The court must review the agency's decision to determine that it is based upon a consideration of relevant factors and does not evidence a clear error of judgment. *Bowman, supra.*

[2] Reviewing this Commission decision, we recognize that this is a unique case. In this instance the Commission was called upon to assess fitness where there was no record of company misdeeds; rather, fitness was at issue only because the sole-proprietor had been convicted of nontransportation related crimes. Notwithstanding the fact that the grant of authority will be issued to the Company, the Commission focused solely upon the fitness of the individual proprietor, James Wilkett. Such an inquiry is misdirected. While the proprietor's fitness may be relevant, the primary focus should be upon the Company's record of operations. In this instance, the record reveals and the Commission acknowledges that since commencing operations in 1978, Wilkett Trucking has *never* been cited for violation of Commission rules or regulations. The Company has demonstrated its commitment to continued lawful service by employing a compliance consultant (a former Commission regional director) to monitor Company practices and recordkeeping. There is no record evidence to suggest that the company would operate unlawfully in the future. Nevertheless the Commission

2. Petitioner states that the crime occurred during a "barroom brawl" and that the defendant, Wilkett, pleaded self-defense. The conviction is on appeal. Reply Brief at 17 n. 3.

3. In *Bowman Transportation,* the Supreme Court reviewed the Commission's grant of authority to three trucking companies under the standards established in 49 U.S.C. § 307 (1976). In this case we are called upon to review Commission action under 49 U.S.C. § 10922(b)(1). These two statutes are essentially identical, the more recent statute is a recodification with minor changes in language.

concluded that the "genuine risk of future noncompliance" with trucking regulations outweighed the "applicant's assurances that he will conduct his operations lawfully." *Wilkett IV, supra,* at 3. The Commission based its conclusion that the Company was unfit solely upon its view that James Wilkett's convictions were indicative of a predisposition on the part of the Company to violate trucking statutes and regulations. That conclusion is unreasonable.

The Commission's duty is to protect the public from *carrier* misconduct by issuing licenses only to carriers who are found to be "fit." [4] The fitness of Wilkett Trucking, the carrier, and James Wilkett, the individual, are severable. The opinion for Division I of the Commission reflects the proper focus in this case. The Division stated:

> [A]pplicant's misconduct has not been shown to relate in anyway to his existing or proposed trucking operations and cannot be considered flagrant and persistent disregard of transportation related laws or regulations. It is also clear that his company is now being managed in such a manner as to insure that its operations will be in compliance with the laws, rules, and regulations governing interstate motor carriers. The Commission responsibilities in considering fitness of a motor carrier applicant are not directed toward punishment of misconduct, whether transportation related or not, but are to protect the public and others from continuing misconduct by a carrier. Without in any way condoning applicant's misconduct in other areas, we are satisfied that he has demonstrated that his trucking operation is being conducted in compliance with applicable law and regulations.

Wilkett II, supra, at 4.

We endorse this assessment of Wilkett Trucking's fitness.

In addition to improperly equating James Wilkett's fitness with that of the Company, the Commission also disregarded its own standards for evaluating fitness. When judging a carrier's fitness in light of past violations, the Commission has consistently applied the following test:

> In determining the fitness issues, consideration must be given to the nature and extent of violations, such mitigating circumstances as might exist, whether the carrier's conduct represents a flagrant and persistent disregard for the provisions of the act, and whether sincere efforts have been made to correct past mistakes.

Greyhound Lines, Inc. v. The Gray Line Scenic Tours, Inc., 121 M.C.C. 242, 265 (1975).

There is no indication that the Commission applied this test in the instant case. Without analysis, the Commission simply stated that a finding of unfitness was "mandated" because it found it not "likely that [Wilkett] would conduct himself as a motor carrier with any greater respect for those laws and regulations applicable to such carriers than he has with respect to those laws applicable to him as an individual." *Wilkett III, supra,* at 3. The Commission's *Wilkett* opinion does not evidence an adequate consideration of the relevant factors identified in *Greyhound Lines* and other fitness cases. In numerous cases where a license applicant has a record of prior violations of transportation statutes and/or regulations, the Commission has carefully scrutinized the past violations and considered mitigating circumstances.[5] *Sulli-*

4. The Commission has noted that the fitness inquiry is "*prospective* in nature having as its primary purpose the protection of the shipping public from a carrier with a negative compliance disposition." *Allan B. Robbins, d/b/a Robbins Trailer Service,* MC–160342 (Oct. 13, 1982) (emphasis added).

5. Most recently in *Robbins, supra* note 4, the Commission granted authority to an applicant whom it described as displaying a "cavalier and disdainful attitude toward record keeping" which was "deplorable." *Id.* at 7. Since 1970, Robbins had repeatedly been found to be operating in violation of ICC regulations, held in contempt of court, and fined. The Commission acknowledged "numerous violations of [Department of Transportation] recordkeeping requirements" and a "general pattern of noncompliance." The Department of Transportation's Office of Compliance and Consumer Assistance "stressed the record showing of applicant's

van's Motor Delivery, Inc., 123 M.C.C. 559 (1975); *Johnny Brown's, Inc.*, 111 M.C.C. 905 (1970); *Eagle Motor Lines, Inc.*, 107 M.C.C. 499 (1968). The Commission has recognized the necessity to carefully consider the nature and extent of violations and any mitigating factors because

> otherwise the denial of a certificate on the basis that the carrier is unfit would be a punitive measure directed only at past unlawful operations, and as a practical matter, amount to retribution, not sound regulation. To avoid this pitfall, consideration of a carrier's fitness should embrace an evaluation of its willingness and ability to comport in the future with the applicable rules and regulations of this Commission.

Eagle Motor Lines, Inc., supra, 107 M.C.C. at 503.

In its *Wilkett* decisions, the Commission did not apply its aforequoted standards and philosophy in evaluating the fitness issue. Such an unexplained departure from previously applied standards suggests that the Commission's decision in this case is arbitrary and capricious. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 806–09, 93 S.Ct. 2367, 2374–75, 37 L.Ed.2d 350 (1973); *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 620–21 (D.C.Cir.1982). The Commission's decisions in *Robbins* and *Wilkett* are difficult to reconcile and, at the least, suggest an inconsistency in decision-making.

III.

[3] Because the Commission erred in equating the Company's fitness with that of the proprietor, James Wilkett, and because the Commission failed to apply its usual standards in adjudging fitness, the decision in *Wilkett Trucking* is reversed.

The Commission based its denial of the requested authority solely upon the fitness issue. As the finding of unfitness is clearly in error, the Commission is directed to issue the authority requested. However, the Commission did not have the opportunity to consider whether the new, expanded operating authority should be unqualified or issued for a limited time period, subject to review. Therefore, the case is remanded to the Commission for the purpose of promptly issuing the authority with such reasonable time limitations as it deems necessary.

Judgment accordingly.

Leola M. BROADNAX, Appellant,

v.

UNITED STATES ARMY.

Leola M. BROADNAX, Appellant,

v.

U.S. ARMY HOSPITAL NUREMBERG.

Nos. 83–1082, 83–1083.

United States Court of Appeals,
District of Columbia Circuit.

June 24, 1983.

Medical malpractice action was brought against the United States Army alleging malpractice by army doctors in Germany. The United States District Court for the District of Columbia dismissed complaint on jurisdictional grounds, and an appeal was taken. The Court of Appeals held that

> continuing and long time failure to abide by lawful regulations." *Id.* at 5. Acknowledging that "a denial on fitness would seem to be in order," nevertheless the Commission granted the authority requested with the condition that the grant be reviewed in two years. The Commission justified its grant in *Robbins* by stating:
>
> > It is not the Commission's policy in determining fitness to punish a carrier for past wrongs. While appropriate weight should be given to past violations, even a record of knowing and willful past violations is no bar to a finding of fitness.
>
> *Id.* at 6.