Mike - take a look
JHR

BEFORE THE

INTERSTATE COMMERCE COMMISSION

BURLINGTON NORTHERN INC. - CONTROL AND MERGER - ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY	)	F.D. 28583 (Sub-No. 1) et al
STANLEY E. G. HILLMAN, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR - TRACKAGE RIGHTS - BURLINGTON NORTHERN, INC.	)	F.D. 28583 (Sub-No. 22F)

OPENING BRIEF OF THE TRUSTEE
("Milwaukee Road")
VOLUME I

STANLEY E. G. HILLMAN, TRUSTEE
OF THE PROPERTY OF CHICAGO, MILWAUKEE
ST. PAUL AND PACIFIC RAILROAD COMPANY

By his Attorneys:

Thomas H. Ploss
William C. Sippel
888 Union Station
Chicago, Illinois 60606

Drafted by Ron Lee Pg 1

312/648-3844

OF COUNSEL:

Isham, Lincoln & Beale
One First National Plaza
Suite 4200
Chicago, Illinois 60603

312/558-7500

Sarah F. Holzsweig
Isham, Lincoln & Beale
1050 17th Street, N.W.
Washington, D.C. 20036

TABLE OF CONTENTS

VOLUME II: APPENDICES TO BRIEF

TABLE OF AUTHORITIES CITED

B. Statutes and Regulations

C. Other Authorities

BEFORE THE

INTERSTATE COMMERCE COMMISSION

BURLINGTON NORTHERN INC. - CONTROL AND MERGER - ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY	)	F.D. 28583 (Sub-No. 1) et al
STANLEY E. G. HILLMAN, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR - TRACKAGE RIGHTS - BURLINGTON NORTHERN, INC.	)	F.D. 28583 (Sub-No. 22F)

OPENING BRIEF OF THE TRUSTEE
("Milwaukee Road")

INTRODUCTION

The transactions proposed in this proceeding bear the potential for fundamental change in the status quo ante of the competitive relationship between Milwaukee Road and Burlington Northern (BN). While Milwaukee Road in the Northern Lines Merger Case[1] which created Burlington Northern was sought to be protected by the Commission's imposition of several conditions to improve its competitive abilities vis-a-vis BN, to the extent that the Commission stated "... the elimination of intercarrier routing barriers and the strengthening of Milwaukee were sine qua non elements in our approval of the merger,"[2] Milwaukee Road now finds itself in such financial extremis that further loss of market share to BN as a result of this transaction will handicap its urgent

1/ F.D. 21478 et al., Great Northern Pac. & B. Lines, Merger - Great Northern, 331 I.C.C. 228, at 356-358 (1967).

2/ id., 333 I.C.C. at 392.

efforts to restructure and reorganize. If the Commission, by its approval of the instant application, were to abort such efforts and to throw the resulting corpse onto Congress for indecent burial, in Potter's Field, at public expense, the chief beneficiary of such a demise would be Burlington Northern.

I
THE CONTEXT OF THE CASE

A. The Applications

To quote Administrative Law Judge Clerman's Report and Order on Prehearing Conference herein, served April 6, 1978:

> Applicants, common carriers by railroad subject to Part I of the Interstate Commerce Act, seek authority under sections (5)(2) and 20a of the act for the merger of Frisco into Burlington, thereby to form a railroad system with more than 29,000 miles of track extending across 25 states between the north Pacific coast and the Florida panhandle, and between the Great Lakes and the Gulf of Mexico, a railroad system that would control, as well, extensive motor carrier operations. Joint applications were filed, accordingly, by BN and Frisco, on December 28, 1977, and January 14, 1978, and the proposal was published in the Federal Register of January 27, 1978. [43 F.R. 3788-9].

To quote in part from the Federal Register issue identified:

> If approved by the Commission, the Frisco will be merged into BN and Frisco's separate existence as a corporate entity will cease. The surviving company will be Burlington Northern, Inc., which will unify all present operations of Frisco and BN under common management. All properties of the Frisco will be under BN ownership.
>
> Frisco owns and operates a 4,700 mile railroad system serving ... nine states ... Principal routes include: Kansas City to Birmingham via Springfield, MO, and Memphis, TN; ...Kansas City to Tulsa via Fort Scott, KS...

> BN with its subsidiaries operates a 25,000 mile railroad system serving the states of [19 in the United States and 2 in Canada]. Principal routes extend: ... from Chicago to Seattle via the Twin Cities and Spokane; ... from Spokane to Portland...
>
> The two principal points of interchange between BN and Frisco are St. Louis and Kansas City. It is proposed that present Frisco operations will be completely integrated into BN and that substantially all of the current Frisco railroad system will be operated as the Frisco Region of BN. ...

The point of the above recitation, with which there is no disagreement, is the enormity of the resulting system following merger and its rail[3] traffic aggrandizing impacts. In Volume 1 of the Applications, at page 3, responding to 49 CFR §1111.1(a) of the Consolidation Procedures, one of the "Purposes of the Proposed Transaction" is given as "(v) Increase in net income over that realized by the two companies separately...," the first of many references to the expected "synergistic effect" of the merger. Therein as well, on pp. 3-8, are offered "Public Interest Justifications" which themselves in part recite some of the very considerations important to a shipper in deciding which rail route to use: (p. 5):

> "(i) Single line service for traffic originating and terminating in the BN-Frisco 25-state service area;
>
> (ii) More direct routing of joint traffic;
>
> (iii) Elimination of the present BN-Frisco interchanges and the associated delays in transit;
>
> (iv) Shorter and more reliable transit lines for many shipments;
>
> (v) Enhanced ability to control and trace shipments; and
>
> (vi) Increased opportunities for innovative service and rate proposals."

3/ No attempt was made in the Applications or later in the affirmative case to prove any likelihood of traffic gains from any other form of transportation. No studies were made (Witness Grayson, Tr. 316); no intermodal competitive studies were undertaken (Menk, Tr. 45-6).

On page 6 of Volume 1 of the Applications, applicants descant on the "single line service" opportunity the merger would give them:

> "The merged company will be able to offer single line service from Portland, Oregon; Seattle, Washington; Vancouver, British Columbia, and other points in the Pacific Northwest to such points as Memphis, Tennessee; Birmingham, Alabama; Pensacola, Florida, and other points in the Southeast. The consolidated company will also be able to offer single line service from the Chicago area to and from origins and destination in Texas and Oklahoma."

Traffic gains to Applicants are an integral goal of the merger: on pp. 6 and 7 of Volume 1 of the Applications "traffic gains," "Increased traffic flow," and "stronger traffic base" are further offered in support of the Commission's approval. More precisely, among the "Arguments in Support of the Transaction," Volume 1 of the Applications at pp. 56-60, applicants claim "reduced transit time and increased service reliability for a substantial body of traffic, improved freight car supply," "single-line service" between the Pacific Northwest and the Southeast and Southwest; "shorter line-haul movement of traffic over the consolidated system;" "significantly greater control of the movement of individual shipments;" shorter transit time and more frequent service; "reduction in loss and damage;" "more consistent transit times;" "an effective increase in the available freight car fleet" - "a synergistic effect which will result from the combination of the two fleets..." [emphasis added]. All these proposed competitive advantages are reduced to a total of $66.6 million in annual revenue gains for the merger company (Application, Vol 5, Exhibit (hereinafter "Ex.") A-15 (viii), p. 7), of which applicants suggest Milwaukee Road would contribute $3,054,960

annually (Ex. A-15 (vii), p.1): the eighth largest loss among the 47 railroads there listed as losing revenue to the merged company.[4] Of the entire net dollar benefits said to be accruing to the applicants from their merger following its third year, 51.3% was projected as attributable solely to revenue gains.[5] Ominously from competitor railroads' viewpoint, no claim was made by applicants that the merger would gain any traffic not now moving by other means of transport: thus the merger becomes "predatory," in that its sole source of increased revenue is business extracted from other railroads. Milwaukee Road is one of these, and as will be seen below, anticipates moving from a claimed "8th" to a "First" ranking in revenue losses to applicants.

Another aspect of the Application is tendentious: at pp. 66-68 of Volume 1 a lengthy (and, as proved during the course of the proceedings, useless) polemic is delivered against exercise of the Commission's power under former Section 5(2)(d) of the Interstate Commerce Act (now 49 U.S.C. §11344(c)) to require "forced inclusion" of any other railroad, particularly a "marginal" railroad, as a condition of the Commission's approval of the transactions. The argument is demonstrably tendentious for exhibiting BN's continued opposition to Milwaukee Road's efforts at its inclusion in the BN system, discussed below; but in that it adopts as support the Preliminary Report of the "Rail Merger Study"

4/ The largest projected gains turned out to be from financially strong railroad systems which, with the exception of Santa Fe, participated minimally if at all: Southern ($7.9 million); Missouri Pacific ($7.7 million); Family Lines ($7.7 million); Union Pacific ($5.8 million).

5/ $17.1 million additional annual net freight revenue divided by $33.3 million net annual cost savings. (Exh. H-9, p. 13, Table 2). This was confirmed by witnesses Menk (Tr. 157), Grayson (Tr. 302) and Donohue (Tr. 482).

of the Commission's Rail Services Planning Office (id., p. 68), it attempts to use a Commission policy, since codified as 49 CFR §1111.10, which in its final form actually portends a policy befitting Commission assistance to railroads like Milwaukee Road: (§1111.10(e)(2), 359 I.C.C. at p. 200):

> (2) The Commission recognizes that a particular consolidation of strong carriers could worsen the condition of other railroads to the extent that they could not survive. In such a situation, the Commission will attempt to assess the impact of a particular carrier's being forced into reorganization or having to terminate service. If it appears that the end result of a proposed railroad consolidation would be the permanent cessation of essential services by some other railroad, the Commission may deny the consolidation application or condition its approval upon the willingness of the applicants to restructure their proposal. [emphasis added]

B. Position of Milwaukee Road

Milwaukee Road, by its counsel, adumbrated its position[6] at the Pre-hearing Conference held in these proceedings March 27, 1978. The salient points of this statement of position are (Transcript (hereinafter "Tr."), pp. 21-24):

--That Milwaukee Road is a protestant to the grant of authority requested by applicants;

--That Milwaukee Road's Trustee is charged with determination of the reorganizability of the railroad on an income basis;

--That Milwaukee Road's likely revenue losses to the merged BN/Frisco were gauged to be "at least $13 million" annually;

--That deprivation of revenue at that level or at the level projected by applicants would jeopardize reorganization of Milwaukee Road;

6/ Milwaukee Road Trustee's Position was initially stated in the Trustee's "Comments" filed on or about March 13, 1978.

--That past decided cases of the Commission and the Supreme Court held that the continued existence and strengthening of Milwaukee Road were important in the public interest;

--That Milwaukee Road was by decision of the Commission "proclaimed the instrument of the Commission's policy to be a strong competitor" of BN;

--That within 3 years of the Northern Lines merger Milwaukee Road presented its petition for inclusion therein;

--That without its substantial strengthening through conditions on the merger, if the merger is to be approved notwithstanding Milwaukee Road's opposition, it cannot continue to perform its Commission-ordained role.

There can be no questioning of the fact that Milwaukee Road is now and has been a primary competitor of Burlington Northern. Indeed, it is submitted that such fact is res adjudicata. See, Northern Lines Merger, op. cit. supra note 1, 328 I.C.C. at 490: "The record clearly shows that the Milwaukee now provides an essential and efficient rail transportation service in the area where it is a principal competitor of the applicant railroads;" 331 I.C.C. at 599:

> The competition found decisive in the prior report was that between GN and NP in an area extending from the Twin Cities and Head-of-Lakes across the northern tier of States to the Pacific Coast. The preservation of this competition was crucial to the first decision. On reconsideration we conclude that this factor should not be decisive. We find that a properly conditioned merger - with a substantially strengthened Milwaukee - will actually enhance competition in the area and will be consistent with the public interest, notwithstanding elimination of such competition as exists between the two lines.

331 I.C.C. at 882-3:

> * * * We agree with the Milwaukee and Union Pacific that, as now worded, condition 20 will impose upon Milwaukee the definite responsibility of maintaining central and northern route competition. We also agree with Milwaukee that this fact, ...might well destroy Milwaukee's northern route as a factor in competition for traffic to and from northern California and negate our intention that Milwaukee will become a "ratemaking transcontinental railroad" and a "meaningful transcontinental competitor" of the applicants * * * We found in both the original and reconsideration reports that creation of strong competition from Milwaukee would be, among other factors, an essential predicate to the conclusion that applicants' merger would be consistent with the public interest * * * [emphases added]

333 I.C.C. at 392:

> * * * It is clear from our report on reconsideration and further hearing that the elimination of intercarrier routing barriers and the strengthening of Milwaukee were sine qua non elements in our approval of the merger. * * *

In denying the Milwaukee Road's application for inclusion into BN, the Commission held, 348 I.C.C. at 830 (1977):[7]

> An even stronger reason for denying the relief sought by the Milwaukee [i.e., inclusion] is to be found in the rationale of the Northern Lines merger decision itself. In granting the BN's predecessors the merger authority they sought, the Commission recognized the result would be a substantial reduction of competition on the east-west routes through the northern tier of States between Minneapolis and St. Paul, Minn., and the Pacific Northwest. The disposition of the monopoly and competition issues presented was grounded largely upon the presence of a "substantially strengthened Milwaukee" as the sole remaining competitive rail carrier in the Northern corridor. * * * We are not prepared to permit a party to one of our decisions to invoke a condition imposed therein in such a way as to subvert the basic premises of that decision itself.

7/ Reversed, sub nom. Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. United States, 585 F. 2d 254 (7th Cir., 1978).

In their consideration of the Northern Lines Merger case, the reviewing 3-Judge District Court, and the United States Supreme Court affirmed the special public-interest role in providing competition to BN accorded the Milwaukee Road by the Commission. United States v. United States, 296 F. Supp. 853, at 864-868 (D.D.C., 1969); Northern Lines Merger Cases, 396 U.S. 491, at 514-516 (1970). After all these decisions, each evincing firm Commission policy specifically maintaining Milwaukee Road as BN's primary intramodal competitor, the Commission is no longer free to suggest as it did in its Decision served herein October 27, 1978 (p. 3) "We are not deciding Milwaukee Road's position as a competitor of BN." The issue is res ajudicata.

Furthermore, it is not only in the Twin Cities-Pacific Northwest market that Milwaukee Road is a Commission-appointed competitor of BN. Milwaukee Road won access to Louisville, Ky. by Commission imposition of trackage rights over Louisville & Nashville Railroad in Louisville & N. R. - Merger - Monon Railroad, 338 I.C.C. 134 (1970),[8] wherein the Commission held (id. at 185): "Our principal purpose in granting the Milwaukee trackage rights request is to provide for a new competitive route between southern points and Chicago." When the Commission was called upon to arbitrate differences between Milwaukee Road and L&N over the trackage-rights contract, the Administrative Law Judge, affirmed by the Commission, perceptively held "Milwaukee is, in effect, simply the instrument of the Commission's policy to counter anticompetitive effects of the merger otherwise approved and authorized." Chicago, M. St. P. & P. R. Co. - Trackage Rights, 342 I.C.C. 578, at 593 and 600 (1973).[9]

8/ Sustained, sub nom. Louisville & N. R. Co. v. United States, 369 F. Supp. 621 (W.D. Ky., 1973), aff'd per curiam, 38 L. Ed. 2d 733.

9/ Sustained in the same opinion cited in note 8.

This record is clear that Milwaukee Road is a distinctive competitor of BN in both Pacific Northwest-Twin Cities-Chicago markets and in Chicago-Southwest and Chicago-Southeast markets, and that in each of these BN will improve its position vis-a-vis Milwaukee Road as a direct result of this merger (see below).

C. Milwaukee Road's Current Position Requires Further Commission Assistance

(1) The merger will improve applicants' ability to penetrate Milwaukee Road traffic base.

The Northern Lines Merger cases firmly established the principle, again invoked in the Monon Merger case (338 I.C.C. at 169) that "In view of the public inerest criteria of section 5(2) and the goals of the national transportation policy there is no question of our power to improve the positions of carriers affected by a proposed merger." [emphasis added]

Milwaukee Road is in demonstrable need of further improvement. As the instant record opened, it had just entered reorganization;[10] prior thereto, in the BN Inclusion proceedings,[11] it had argued that the Northern Lines merger had directly caused its financial difficulties.[12] As this Brief is being written, Orders of the Reorganization Court have required, and there have been filed with the Commission, papers preliminary of an abandonment proceeding for all Milwaukee Road lines west of Miles

10/ Finance Docket No. 28640, Chicago, M. St. P. & P. R. Co. Reorganization.

11/ See CMSt.P.& P. v. U.S., supra note 7, at 261.

12/ See also, Chicago,M.St.P.&P.R. Co. - Trackage Rights, supra, 342 I.C.C. at 593-4.

City, MT in docket No. AB-7 (Sub-No. 86F). The Commission has, in its Finance Docket Nos. 28688, 28801, 29013, 29033, 29053, and 28640 (Sub-No. 4) recognized the urgency of the Trustee's cash problems by authorizing the issuance of his Trustee's Certificates in amounts aggregating $106+ million. Until the decision of the Reorganization Court on June 1, 1979, the Trustee had prepared for embargo of his lines of railroad extrinsic to what was termed a "Miles City Sub-Core" of lines likely to be part of a reorganized Milwaukee Road. Altogether, indicia of Milwaukee Road's financial weakness at this time are so prevalent as to warrant official notice being taken thereof, as was done in Docket No. AB-7 (Sub-No. 37), Decision served June 28, 1979, p. 4.[13] The Trustee is expected to file a plan of reorganization on or about August 6, 1979.

Meanwhile, Milwaukee Road continues a system substantially identical to that operated in 1976, the "traffic base" year mandated for this proceeding. Until the Reorganization Court and the Commission order differently, or "cashlessness" forces an embargo of lines, Milwaukee Road perforce will continue those operations. As long as such operations continue Milwaukee Road continues in direct competition with many transportation services operated by Burlington Northern; and, should an abandonment application for Milwaukee Road lines west of Miles City, MT, be granted by the Commission,

13/ Counsel supplied the Administrative Law Judge, with accompanying notice to all parties of record, copies of submissions respecting the embargo initiative and the Reorganization Court's decision. Reliance on official notice is also made pursuant to the Report and Order on Prehearing Conference herein, served April 6, 1978, p. 6.

remaining Milwaukee Road lines in most instances carry with them the proximity of BN lines. As stated by Milwaukee Road President Smith (Exh. H-132, pp. 5-6):

> * * * That there will be a [reorganization] Plan presented now seems likely, and such a Plan will probably include continued operations of the [Milwaukee Road] Chicago-Twin Cities/Omaha/Kansas City/Louisville/Green Bay lines by the reorganized railroad. In the Chicago-Twin Cities/Omaha/Kansas City corridors the reorganized Milwaukee Road will continue in direct competition with BN. * * *

On the direct questioning of the Administrative Law Judge (Tr. 5543-5553), President Smith affirmed that the Sub-22 application for trackage rights herein would continue to connect with retained Milwaukee Road lines at Miles City, MT (Tr. 5548) and, most emphatically, the continued competition experienced with BN (Tr. 5553-4).

An overview of the interlocking systems of the present BN and Milwaukee Road, a sufficient index of competition between them to satisfy the Supreme Court, is found at Appendix A to the Northern Lines Merger Cases decision, 396 U.S. following page 530. More specifically from this record, we have BN officials and others expressing firm opinions of Milwaukee Road-BN competition not only in the "northern tier" of States (witness Menk, Tr. 62, 67, 171, 172, 173; Round Tr. 758; Tolan, Tr. 3230-2)[14] but also between Chicago and the Twin Cities (Menk, Tr. 171) and Chicago and Council Bluffs/Omaha (Tolan, 3232, 3237); and the record includes clear indications of current BN competition with Milwaukee Road's Louisville route into the Southeast. See, for example, "BN Run-Through Train Operations," dated April 14, 1978, lines 2 and 3, stating BN's operation over its interchanges at Woodlawn, IL and Centralia, IL, with L&N and Southern, respectively, in the "Market Territory

14/ Reference to this testimony may be redundant in view of the shrill and petulant BN complaints of Milwaukee Road pricing policies contained in Ex. H-196, Tr. 7171-2 with which Milwaukee Road witness Reynolds took issue (Ex. H-236, Tr. 8026-56).

Served" between "Burlington Northern points and Southeast;" page 2 of SCL's similar submission, dated May 2, 1978, confirming that its trains Nos. 768-769 run through with BN over Woodlawn, IL; sheet 3 of Southern's similar submission dated May 2, 1978, confirming that its trains Nos. 119-120 run through with BN over Centralia, IL in the markets "South Southeastern and North Southeastern States" and "North Central and Northwest States;" and especially to be noted is the proposed - and already executed - Stipulation of settlement between applicants and Southern, submitted October 17, 1978, paragraph 3 whereof would require maintenance of "present traffic and operating relationships existing between BN and Southern" including "not by way of limitation, cooperation in providing and maintaining present levels of run-through train service at Centralia, Illinois pursuant to agreement between BN and Southern dated July 6, 1970..." Milwaukee Road has no run-through operations over Louisville.

The Stipulation quoted above may or may not conflict with applicants' plans to eliminate two daily trains (one in either direction) between BN and Southern over Centralia (Ex. A-16, p. 13); it came too late for purposes of cross-examination of applicants' operating witnesses. But applicants' operating plan clearly forecasts even further improvements in BN-Southern run-through services following this merger: Ex. A-16, Appendix 10, p. 2 gives the proposed schedule of a Portland (OR)-Birmingham train via Kansas City, ending with the succinct "Deliver train intact to Southern Railway." This is accomplished, as there stated, not 5½ days from leaving Portland; by other testimony unrebutted by Milwaukee Road, Milwaukee Road suffers a one-day "service penalty" adversus BN on the Portland-Twin Cities segment of service (Tolan, Tr. 3232). The improved position of BN in Northwest/Midwest/ Southeast traffic following this merger is clear.

Similarly, Milwaukee Road competes with BN today between Chicago and Kansas City, thence over connections to the Southwest. Applicants' operating plan following merger proposes Kansas City as a major traffic node; but with one exception, the new train service following merger will operate through Kansas City. Cf. Ex. A-16, Appx. 10, pp. 2-7. There is no plan for interchange improvement with other railroads in Kansas City: "it is a plan of the merged company to continue the interchange deliveries as they are now made" (Able, Tr. 2037). What this does for the merger applicants was stated as follows (Able, Tr. 2043):

> * * * With single-line service we would hope, of course, that there would be an expeditious movement through Kansas City and this will be an advantage to the shippers. Therefore, ...it would appear that the single-line service would be more time sensitive than would a two-line service with interchange at Kansas City.

The effect this run-through service will have on Milwaukee Road's traffic was forecast in Milwaukee Road's traffic Study, Ex. H-112. The magnitude of dislocation from the resulting service disadvantage begins with Milwaukee Road's 1976 participation in interchange with Frisco at Kansas City (Exh. H-112, p. 3):

> Our Annual Report "Recapitulation of Loaded Cars Interchanged" for the year 1976 revealed that the Milwaukee Road interchanged a total of 12,409 loaded cars with the Frisco Railroad, all of which were handled via the Kansas City, Missouri gateway. * * *

Heretofore, Milwaukee Road has been an important connection of Frisco at Kansas City (Knuth, Tr. 1084). After merger, however, Applicants plan on diverting traffic and beginning the new trains "simultaneously" (Able, Tr. 2091); the new run-through trains will be created in part by traffic diverted from other railroads (Able, Tr. 1813-4).

Thus, in every compass quadrant of its service area Milwaukee Road will be directly threatened by applicants' merger plans. Their general intentions following merger need not be guessed: they will aggressively exploit every advantage to the goal of obtaining all possible traffic (Round, Tr. 707, 784, 814).[15] Applicants' lead-off witness, the inspiration for the merger, himself dismissed Milwaukee Road as a system whose usefulness has ceased to exist (Menk, Tr. 97) and doomed it to proper liquidation from the diversions of traffic to be experienced following this merger (Menk, Tr. 43, 65, 167). There is no question that this record poses the portentous issue set forth in the Introduction above.

(2) Appropriate Remedy

As seen, the business principles of James J. Hill are alive and well and living in St. Paul. The Commission, however, need not apply them to this case; to date, the Commission and its staff have been helpful, not disdainful, of Milwaukee Road's plight and the need in the public interest to assist its effort to reorganize and continue to fulfill its common-carrier responsibilities under the Interstate Commerce Act. What continues to be required is emphatically not the expression of sympathy as was found in Mr. Menk's public statement on the occasion of Milwaukee Road's bankruptcy;[16] or the pale "I-told-you-so" of the academician;[17] but action, and quickly.

15/ See H-236, p. 6, and Appendix A thereto as further illustration of this behavioral pattern.

16/ "Every thoughtful railroad man and woman has been saddened by the news that the Milwaukee has filed for bankruptcy. Our country now is confronted by fresh evidence that we have not yet mastered the ways to maintain a workable and financially sound national transportation system. * * *" Statement of Louis W. Menk, Chairman and Chief Executive Officer, Burlington Northern Inc., released December 19, 1977.

17/ Conant, "The Future of the Milwaukee Road", 45 I.C.C. Prac. J. 280, at 293 (1978).

It was earlier observed that applicants' fears of "forced inclusion" of Milwaukee Road proved groundless. Neither Milwukee Road nor any other railroad filed an application for inclusion in the transaction, and the procedural time-frame for such filing has expired. The BN Inclusion proceeding, initiated by Milwaukee Road in 1973 and revived following the 7th Circuit Court's opinion reversing the Commission's dismissal of the actual application for inclusion, cannot possibly provide an appropriate remedy in the time required. Under the procedure proposed by the Administrative Law Judge therein, affirmed after administrative appeal by Decision served July 25, 1979, Milwaukee Road is first required to prove "substantial harm" from the Northern Lines merger, and only when it does, will the Commission entertain proof of the need for the several conditions proposed therein on the continuing approval of the Commission for the merger.[18] Milwaukee Road's Trustee has renounced corporate inclusion into BN as a goal of that proceeding; and the two-stage format would, even if commenced immediately, require months if not years of discovery, hearing, and appellate procedures with BN resisting every step of the way.

Assuming arguendo that the traffic losses to Milwaukee Road following this merger are proven and that they will have the devastating impact conceded by applicants' chief witness (Tr. 43, 167), the Commission may scarcely do better than applying the first principle of the Hippocratic Oath in the public interest: "Above all, do no harm." Milwaukee Road President Smith testified (Ex. H-132, p. 4):

18/ F.D. 21478 (Sub-No. 4), Findings and Order on Prehearing Conference, served March 19, 1979, pp. 2-3.

> * * * The policy of the public interest, reaffirmed by the Commission in denying our BN inclusion application, should result in a corollary Commission policy of improving Milwaukee Road's relative ability to provide that competition which now, as a result of our financial difficulties, is at a low ebb.
>
> Denial of the authority sought for BN and Frisco to merge is a logical place for the application of such a Commission policy. * * *

II

THE APPLICATION SHOULD BE DENIED[19]

A. The Proposal is Devoid of Public Interest Benefits.

(1). Nothing contained therein meets current restructuring needs.

Despite the pious invocation of the 3-R and 4-R Acts in the applications (Vol. 1, p. 4), applicants' proposal cannot be described as founded in any of the restudies of railroad problems or proposals for reform in the industry and its governing law precipitated by those Acts. The 3-R Act, of course, addressed itself to the peculiar and urgent problems attendant upon the bankruptcies of the huge Northeastern rail systems and is wholly inapplicable here (cf. Tr. 64-5). To be sure, the 4-R Act does in its Section 101 reaffirm the longstanding[20] National policy to encourage railroad consolidations; if it did not, applicants would not be before the Commission. But other sections of the 4-R Act, particularly sections 503, 504 and 901, have produced re-examination of the industry structure and proposals for change which differ markedly from applicants' proposal.

19/ Milwaukee Road also opposes the proposed control of Frisco Transportation Company, the Frisco's affiliated motor carrier, by BN pending in Docket No. MC-F-13500.

20/ See Ploss, "The Railroad Merger Picture: A Reply to Critics," 4 Cumberland-Samford L. Rev., 458 (1974).

The Section 503 Final Standards, Classification, and Designation of Lines of Class I Railroads in the United States (U.S.D.O.T., 1977), supposed to "further aid railroad management with future decisions regarding investment, operations, and facilities rationalization..." (Vol. I, p.v) identified six "corridors of consolidation potential" in which applicants operate (pp. A3-10-21: Chicago-Omaha/ Minneapolis/St. Louis; Kansas City/ Omaha-Colorado; Dallas/Ft. Worth-Houston; Chicago-Kansas City), which are supposed to be combined through consolidation: "* * * Specifically, [the §503 Report] should dovetail closely with with those parts of the Section 901 Study that examine physical restructuring and corporate realignment of the industry. * * *" (id., p. 3). Nothing in applicants' proposal affects these "corridors of consolidation potential" in the least, except through diversion of traffic from parallel railroads.

The Sections 504/901 report, entitled A Prospectus for Change in the Freight Railroad Industry, (U.S.D.O.T., 1978) contains an entire chapter 4, "Restructuring: Abandonment, Coordination, Merger, Public Ownership" which notably comments (p. 92):

> There have been few large-scale end-to-end mergers. Many perceived advantages of such mergers could be achieved by such means as run-through trains and joint terminal facilities. Since rail freight flows are highly dispersed, end-to-end systems would still have to cooperate with other railroads to provide service for the many important freight movements. Mergers that would produce much larger railroad companies may also run into problems of managerial command and control.

Elsewhere, the DOT report opines (id., pp. 92-93, emphasis added):

> The DOT has concluded that mergers are a less promising technique to improve the railroad industry than other approaches to restructuring, described earlier in this chapter. The elements of rationalization contained in the concepts of line transfers, joint use agreements, and abandonments are what actually save costs - not corporate integration per se. The elements that reduce plant and save costs in a good merger are these

> same factors-service consolidation, optimization of an existing plant shared by two previously independent entities, and abandonment of unneeded facilities. All of these elements can occur short of merger. * * *

Then, under the subheading "Coordinated Abandonment", the DOT report (p. 85) refers to the 4-R Act's Section 401 (b), under which "...the Secretary of Transportation may assist in planning, negotiating, or effecting a unification or coordination of operations and facilities with respect to two or more railroads." Much more extensive treatment is given at pp. 86-87 under the heading "Mainline and Terminal Coordination."

The Application herein specifically rejects abandonments, elimination of duplicate routes, reduction of redundant facilities - in a word, "restructuring," as a goal of the proposal. In Volume I of the Application, at page 59, line abandonments are foresworn; at page 62, it is forthrightly stated that "The proposed transaction is not structured for the purpose of eliminating duplicate routes and redundant facilities..." Applicants' lead-off witness not only confirmed that no governmental financial assistance is involved in the proposal (Menk, Tr. 83) but also that BN has no plans to use its charter authority to issue 4-R Act §505 "redeemable preference shares" (Tr. 83-84) and exhibited complete unfamiliarity with the 4-R Act Section 401 process (Tr. 86-87, 96).

As observed above, applicants place apparent heavy reliance upon the Commission's Rail Service Planning Office Rail Merger Study for its endorsement of "end-to-end" mergers, which position applicants claim. Such reliance is mistaken, for as the Rail Merger Study's Final Report is at pains to point out (pp. 24-27), citing Pacific Gas and Electric Co. v. FPC, 506 F. 2d 33 (D.C. Cir., 1974), the resulting policy "is like a press release" and "does not create a set of legally binding rules." As the Commission itself put it (359 I.C.C. at 195-6):

> * * *We emphasize that we are adopting a policy statement, not a regulation. * * * It does not establish a binding norm, and it is not finally determinative of the issues of rights which it discusses. When the policy enunciated in the statement is applied in a specific proceeding, parties to that proceeding will have the opportunity to challenge or support the policy through appropriate evidence or argument.

Furthermore, there is no mention in the General Policy Statement as adopted and codified at 49 CFR §1111.10 stating a Commission preference for "end-to-end" mergers - or for <u>any</u> particular characterization. To the extent any preference can be divined, the statement of criteria under §1111.10(b)(2) and (3) seems to suggest that positive answers to these "restructuring" propositions would advance the proposal before the Commission; and, as seen, applicants here cannot do so. Lastly, there has been no attempted "application" of the policy statement in these proceedings by the Commission, and until there is, the Commission may not proceed without opportunity for adducing evidence and argument thereon.

It is noteworthy that both the Rail Services Planning Office and the Department of Transportation studies agreed on at least one precept: that run-through train services between systems promote service to the public and often are tantamount to merger benefits.[21] The instant record leaves no doubt that neither applicant, despite their individual, extensive run-through operations with other railroads, ever developed or maintained such operations with each other (Menk, Tr. 69; Able, Tr. 1813) and that the proposed operating plan following merger is the first time such operations, <u>dependent at least in part on added traffic produced by diversion from other railroads</u>, will be instituted (Able, Tr. 1813-4, 2091).

21/ <u>Rail Merger Study Final Report</u>, at p. 31; RSPO Rail Merger Study Issue paper No. 7, <u>Alternatives to Merger</u>, pp. 29-31; <u>A Prospectus for Change in the Freight Railroad Industry</u>, U.S.D.O.T., 1978, p. 89, citing the same source.

The Commission, therefore, should take this case in its true light: insofar as the proposed merger is concerned, the hearings and acts of Congress; the studies and proceedings of the Commission; the hearings, proposals, studies, and efforts of the Department of Transportation on railroad restructuring since 1974 are irrelevant. What is before the Commission in this proceeding is, in contrast to those enlightened efforts, atavistic; a reversion to an old-fashioned grab for market power regardless of the impact on competing railroads or the service they provide. As Frisco President Grayson testified in response to a query as to whether adversely-affected railroads would be capable of responding to the new BN (Tr. 303-4):

> "I would just say that has to be one of the problems of the carriers who may be affected as it was our problem when we were affected by other mergers."

If there remained any hope that applicants' proposal could be considered an act of industry statesmanship, Mr. Grayson dispelled it with the words "I have to say to you [the questioner] I don't think our merger should be a vehicle to protect some other railroads who may be in a distressed condition" (Tr. 305), and with his agreement with the proposition that healthy merging lines have no obligation to protect the weaker financial lines (Tr. 313).

It may fairly be stated that the sole increment of recent Government planning to be found in applicants' proposal is to reduce the number of railroads of the Nation by one. It will now be shown that the damage thereby done to Milwaukee Road service capabilities far outweighs that minor gain.

(2.) Applicants' Purpose in Merging is Pure Traffic Aggrandizement

That sole purpose of the applicants' proposal is simply one of self-interest and not that of the public, is clearly demonstrated by the applicants' admitted diversion of traffic revenues from present competing carriers of $71,103,240, which would result in a gain to Nuco of that amount.

J. Round, Traffic witness for the BN in his verified statement, Ex. H-12, page 5 confirms that:

> "A key issue in any merger decision relates to the impact the consolidation would have on the applicants traffic and revenue. A further issue is the determination of the effect the merger would have on non-applicant carriers. The appraisal of these two issues was the purpose of our traffic studies." [Emphasis added.]

The BN and Frisco obviously liked what they saw as a result of their traffic studies, and a decision was made to merge the two carriers in order to aggrandize, enlarge and widen the scope of their share of existing and future traffic markets and revenues, all to the detriment and demise of competing carriers. Mr. Round clearly implies in his verified statement Ex. H-12, page 27 where he states:

> "The lengthening of its single-line capability will enable BN to extend its service market by improving service and reliability." [Emphasis added.]

a. Total Traffic Diversion From Protestant Carriers Admitted And Contested.

As previously stated, the BN and Frisco obviously liked what they saw as a result of their traffic studies; however, they seriously (intentionally or unintentionally) understated the impact this proposed merger would have on traffic and revenues of the merged company, as well as the losses the competing carriers would sustain in traffic and revenues if the proposed merger were to be consummated.

The BN and Frisco designed and conducted a traffic study based on a 1% sampling of their 1976 traffic employing interline settlement abstract records as the sample data base. In compliance with the Commission's new regulations in Ex Parte 282 (Sub-No. 1) (49 C.F.R. §1111.(a)(2)(b)(3)), they filed a so-called Exhibit A-15 Traffic Study with the Commission. In Section 6, Exhibit A-15 (vii), consisting of five pages, they indicated the estimates of gain or losses in revenue which the 74 individual carriers named therein can anticipate should their application for merger be approved by the I.C.C. The total loss of revenue, for all of 74 of the named carriers, is $71,103,240 - which is offset by $4,459,040 for the 47 carriers that will realize gains in revenues, leaving $66,644,200 as the BN-Frisco gain in revenues.

At the start, there were 15 carriers that expressed an interest in the Proceeding (ATSF, MILW, C&NW, CRI&P, ICG, KSC-L&A, L&N, MKT, MOP, SCL, SOO, SOU, SP, SSW and UP). The applicants' Exhibit 15-A, Section 6, indicates that all of these lines can expect to experience a total loss of revenues of $64,312,960. Subsequent to the start of the proceeding, the following lines have withdrawn, viz.: KCS-L&A, L&N, MOP, SCL, SOU,

SP, SSW, UP, and the BN-Frisco admitted loss of revenue these carriers would share is $34,778,860. This leaves a total loss of $29,534,100 of revenue. The remaining carriers (ATSF, MILW, C&NW, CRI&P, ICG, MKT, SOO) will suffer according to the BN-Frisco's calculations in their Exhibit 15-A. However, these carriers still actively participating in the case have vigorously contested the understated revenue losses the BN/Frisco show for their account. Their testimony estimates are shown in the following Table and portray the situation quite clearly as to the understated BN-Frisco figures.

TABLE I

	ADMITTED BY BN-FRISCO IN THEIR EXHIBIT A-15	PROTESTANTS' ESTIMATED LOSSES IF BN-FRISCO MERGE	SOURCES EXHIBIT NO.
ATSF	$6,712,400	$8,100,000	H-104
MILW	3,054,960	14,089,930	H-112
C&NW	1,895,180	2,362,220	H-94
CRI&P	4,504,680	8,634,074	H-119
ICG	6,592,500	8,845,000	H-69
MKT	6,531,180	11,572,615	H-166
SOO	243,200	1,307,577	H-63
	$29,534,100	$55,011,416	

It is not difficult to realize from the above table that the BN and Frisco very seriously understated the impact this proposed merger would have on competing carriers. The inevitable impact on competing carriers will be unavoidable with the faster single-line service and is clearly admitted by Mr. Round in his verified statement, Ex. H-12, on page 27, where he states:

> "The longer single-line haul, with its coincident faster transit times and improved reliability of service, can differentiate the saleable service of one railroad from that of another.....(Emphasis added.)

There is no question, should this merger be approved, that the Nuco, with its inherent advantages of single-line service, abundance of equipment and combined sales force will have the ability to "outsell" its competition, which again is clearly admitted by Mr. Round in his verified statement, Ex. H-12, page 28:

> ".....The sales effort is backed by a strong corporate endeavor to provide rates, service and equipment necessary to put traffic on BN lines for the longest possible haul. These relationships presently are enhanced by a number of supportive services which will have even wider ranges of application for the merged company." [Emphasis added.]

On Page 30 of Ex. H-12, Mr. Round also relates:

> "In any event, by providing good service and maintaining a reasonable car supply, the origin carrier can exert enormous influence on the shippers routing practices." [Emphasis added.]

b. BN-Frisco Traffic Study Completely Understated vs. Milwaukee Road Study.

The BN-Frisco traffic study, while elaborately prepared, narrated and submitted is of absolutely no consequence and extremely unreliable in its attempt to illustrate the Milwaukee Road's losses in traffic and revenue. The applicants' admitted $3 million loss of Milwaukee Road revenues, would, in and of itself be a devastating and disastrous blow, but it is by no means an accurate and realistic illustration of the harm to the Milwaukee Road if this instant proposal is approved.

The Milwaukee Road in its traffic study, Exhibit A-15 (viii), which in all probability is quite conservative, shows an immediate (year one) loss of $5.7 million and in a very short term (year two recurring) a loss of $8.3 million, or a total of approximately $14 million.

From the above comparison of the applicants' estimate of losses (Exhibit A-15 (viii), Section 6, Page 1 of 5) it is quite obvious that the Milwaukee Road will suffer a far greater loss of traffic and revenues than they anticipate and therefore, the only realistic conclusion one can make is that the applicants' estimate of Milwaukee Road losses is drastically and hopelessly understated.

To substantiate and illustrate the fact that the applicants estimate of losses to the Milwaukee Road is inadequate, reference is made to BN's traffic witness testimony (Round Tr. 595-596).

Q. So that the record may be clear, for traffic to have appeared in the study at all, any particular traffic, it had to be already found in the records of the Burlington Northern?

A. Burlington Northern would have had to participate in the route for that movement to show up in my sample, yes.

Q. Conversely the sample would not show any traffic with which, in which Burlington Northern did not participate in the study period? [Emphasis added.]

A. Yes.

Further emphasizing the inadequacy of applicants' traffic study, Mr. Round testified as follows (Round, Tr. 601):

Q. Now, I could extend this at some length, Mr. Round. It is true that at all points at which you have common points with other carriers, either Frisco and the BN, that where there is traffic in which you have not participated today that is moving between common points, all that traffic would be excluded from your diversion study?

A. Yes. If the BN or the Frisco or the C&S or the F.W. & D [have not] participated in the route it would be excluded from our study, yes, sir. [Emphasis and correction added.]

Q. So out there as far as you are concerned there is an unknown quantity of traffic that is subject to potential diversion in addition to the traffic that is part of your diversion study? [Emphasis added.]

A. There is an unknown quantity of traffic out there that, yes, I would say would potentially be available to the new company. [Emphasis added.]

Another example of the deficiency of the applicants' traffic study is contained in Frisco's traffic witness (Knuth, Tr. 1074-1076):

Q. (By Mr. Sippel), with respect to the scope of your traffic studies, sir, it is true, is it not, that your study was limited to traffic that was handled by the Frisco and jointly by the Frisco with the Burlington Northern, Colorado Southern and Fort Worth and Denver? [Emphasis added.]

A. Yes, sir.

Q. In other words, for a movement to be included in your traffic study it was necessary for the Frisco to have participated in the movement?

A. Yes, sir.

Q. Then it is true, is it not, that you could not study traffic that possibly may be diverted as a result of the Merger, traffic that was moving entirely over other rail carrier lines? You could not study that traffic; is that true?

A. We did not.

Q. Could you have, sir?

A. I don't believe we could. I would not know where to get sufficient information and complete information to make a traffic study on that type of traffic which we are not participating in.

Q. Would it simply be then that since the traffic study is based on the data which is in the computer records of both of the applicants that such information on traffic moving entirely over other rail carriers is not in those computer records?

A. True.

Q. Then I think it is fair to conclude, then, is it not, that I will simply ask the question..... have applicants, to your knowledge, made any efforts or attempted to quantify these possible diversions of traffic that are moving entirely over other rail carriers lines. [Emphasis added.]

A. We did not. (Emphasis added.)

The simple logic in this line of questioning is not only to demonstrate the unrealistic, unreliable and understated amount of traffic losses which will be sustained by competing carriers, particularly the Milwaukee Road, but it establishes the fact applicants' traffic studies lack credibility. The cold hard fact of the matter is the applicants admit to a "synergistic effect" on other rail carriers, but did not attempt to quantify the effect.

The record is then clear that neither applicant studied traffic which did not appear in their traffic records. This is a significant consideration in a merger proposed for the specific purpose, among others, of wresting additional freight traffic from competing railroads, the "synergistic effect" referred to by applicants.

The "synergistic effect" is admitted quite clearly by BN's traffic witness (Round, Tr. 710-711).

> Q. So you do not believe, in other words, that merger related traffic gains could continue to grow beyond the 100 percent estimate you have made?
>
> A. I have made no study of it, no, sir.
>
> Q. That was not my question.
>
> A. I am sorry.
>
> Q. My question was: You do not believe that merger related traffic gains could exceed 100 percent of the estimate you have made?
>
> A. I certainly hope they do ultimately.
>
> Q. And you are going to work for it, aren't you?
>
> A. Darn right.
>
> Q. But you don't think it is possible?

A. I did not say that ..... I am hopeful we will continue to show benefits from the standpoint of the new company. [Emphasis added.]

Q. Even beyond the third year?

A. Yes, sir. [Emphasis added.]

This "synergistic effect" is even more vividly admitted in Mr. Round's testimony (Tr. 755).

Q. On Page 2 of your statement you refer to Burlington Northern's primary sales objective to be to obtain an increasing share of the available transportation market. I would like to explore a little bit what you mean by that. I suppose the easiest way to do that is to take an example. [Emphasis added.]

Would it be congruent with the objective to say that if you and your sales people could obtain by offering improved service, particular kinds of services, if you could obtain an additional one million dollars worth of sales revenue you would do so? [Emphasis added.]

A. Yes, sir [Emphasis added.]

Q. If this involved diversion from another line, you would do so in the context of the factors you have laid out in your statement?[22]

A. In the context of the competitive situation, yes, sir.

Q. Would you consider a one million dollar jump in revenue to be significant?

A. Yes, sir.

Q. Five million dollars?

A. Even more significant, yes, sir. [Emphasis added.]

The Milwaukee Road clearly established the "synergistic effect" of this proposed merger on its traffic and revenues, which, as previously stated, applicants miserably failed to do. F. K. Brennan, verified statement, Ex. H-112, p. 7 testified:

22/ Mr. Round in addition to listing the divertibility factors referred ranked them according to priority in his testimony. (Tr. 641-642, 644-5)

"The Milwaukee traffic study was conducted with two objectives in mind: one, to measure the immediate impact on the Milwaukee Road upon consummation of the proposed merger, and two, to identify the longer term effect of the proposed merger." [Emphasis added.]

"In order to accomplish these objectives the term "divertible" was utilized to determine the immediate impact and the term "vulnerable" was utilized to measure the additional longer term affect of the proposed transaction." [Emphasis added.]

The following table for quick reference indicates the results of Milwaukee Road's study of its vulnerable traffic (synergistic effect) that the proposed transaction will have on revenues as a competing carrier.

VULNERABLE

CLASS OF TRAFFIC	CARS (LOSS)	REVENUE (LOSS)
Interline Forwarded	(5,840)	($4,125,140)
Interline Received	(1,690)	($ 628,990)
Overhead (Bridge)	(5,120)	($3,560,190)
Total	(12,650)	($8,314,590)

BN already believes that the Milwaukee Road has already lost some of its competitiveness (witness Round Tr. 757-758).

Q. Would it be fair to say that as a result of the merger the enlarged Burlington system will become more competitive in the (Pacific) Northwest because, for example, of the ability to offer single-line service?

A. I certainly hope so, yes, sir. [Emphasis added.]

Q. Would Burlington Northern become more competitive in terms of serving the (Pacific) Northwest vis-a-vis the Milwaukee Road, for example.

A. Yes, sir. [Emphasis added.]

Q. In that regard, do you consider the Milwaukee Road..... and this is just as a sales person from a sales perspective..... do you consider the Milwaukee Road today to be a stronger competitor than it was, say, two years ago?

* * *

A. I really have not made any specific comparison. I probably would say they are slightly weaker than they were two years ago from a salesman's standpoint. (Emphasis added.)

What happens to "vulnerable" traffic when a route becomes non-competitive for lack of investment over a period of years has been told in another context: the verified statement of Benjamin F. Biaggini, Chairman and Chief Executive Officer of Southern Pacific Company, Ex. H-1 in the record of F.D. 28799, St. Louis Southwestern - Purchase (Portion) - Rock Island, at pp. 10-11:

> Rock Island's progressive deterioration for the past 15 years, ...has caused...The traffic formerly carried over this route [to go to] other railroads and the highway carriers. They did nothing to earn it and have not been required to make substantial investments to handle it. The transferred traffic was a windfall, pure and simple. * * *

B. Applicants' Traffic Study Carries No Evidentiary Weight

Witness Knuth's Verified Statement Ex. H-19 states he was directed by the Chief Executive Officers of the BN and Frisco to make a traffic study to determine the feasibility of unification. To avoid duplication, the Frisco was to study traffic handled jointly with the BN, which meant largely traffic interchanged at Kansas City, Milwaukee Road's sole interchange point with Frisco. He concluded from his study (Ex. H-19, p. 6) that 791 movements out of 7,915 studied represented diversions to the merged railroad. Witness Knuth (Tr. 1075) admitted that his study was confined to traffic data in the computer records of both applicants and he therefore could not assess the devasting effects of their proposed merger on traffic handled by other carriers serving the same geographic areas as the applicants.

Consequently, the 791 movements which Witness Knuth deems as possible diversions (Ex. H-19, p. 6) to the merged company greatly understates the synergistic effects of their proposed merger on protestant carriers for the short and long term. An appropriate rationale of the proposed merger is that the united action of the two railroads, BN-Frisco, will produce a much greater effect on the Milwaukee and 47 other railroads named in Section 6 of Applicant's Exhibit 15-A as losing revenues, than the sum of the individual railroad actions (BN-FRISCO actions). Approval of the proposed merger of the Frisco into the Burlington Northern will

be the BN's second exercise in synergism, the first one being the merger of the Chicago, Burlington & Quincy, Great Northern and Northern Pacific Railroads into the Burlington Northern, Inc. in 1970 (Northern Lines Merger). Prior to that time, the Milwaukee Road was close to those three carriers in total number of carloads of traffic handled each year and freight revenues. See, Great Northern P & B Lines - Merger-GN, 328 ICC pp. 488-492.

As stated in Witness Brennan's Verified Statement H-112, pages 12 - 13, the Commission should not regard as mere rhetoric applicant's repeated boasts on this record of the "synergistic effect" of the merged railroads future success in wresting traffic from competitors. Milwaukee Road's experience since 1970 of the Northern Lines Merger reveals that traffic losses projected by the Milwaukee Road at that time fell far short of what actually occurred as evidenced by prepared testimony of the Vice President-Sales and Service in the Burlington Northern Inclusion Application F.D. 21478 (Sub-No. 4) dated November 30, 1976 to the effect that estimated loss of traffic previously interchanged by the Milwaukee Road with the Northern Pacific, Great Northern and Chicago, Burlington and Quincy and not anticipated as a loss to Milwaukee Road of some $16 million annually. (See Ex. 112, p.13). From this experience and Milwaukee Road's own traffic study it is submitted that Witness Knuth's traffic study is greatly understated, and that the attributes of the proposed merger as outlined in the brochure "Burlington Northern and the Frisco Railway are planning to merge - Here's what it means to you.", will serve to attract a large

portion of the "Unknown quantity of traffic out there, I would say would potentially be available to the new company", (Witness Round, Tr. 601; Knuth, Tr. 1074-1075). That new traffic not presently carried by applicants is a policy target of the merger is clear from the testimony of BN's Witnesses Menk, Tr. 157; Donohue, Tr. 490, 505, 507, and Round at Tr. 707, 710 and Frisco's Grayson, Tr. 302.

Several specific judgmental errors of understated losses projected are shown by the testimony of Frisco's Witness Knuth, the one person on the Frisco who made the final judgments as to divertibility (Tr. 1072). He confessed that he made all such judgments on the basis "from a Frisco standpoint" (Tr. 1130) and on the basis of the existing Frisco System (Tr. 1131-2), rather than from the standpoint of merged railroads. This error alone is sufficient cause to discard the applicants' traffic study.

Because the BN-Frisco study was confined to movements in their computer data base and shown as possible diversions, and the further fact that Witnesses Round (Tr. 601) and Knuth (Tr. 1074-76), as indicated above, admitted the potentiality of an unknown quantity of traffic that they possibly could attract to the new Company, the Milwaukee Road was compelled to develop a traffic study which would show the effects of both short- and long-term losses; hence the Milwaukee Road study is predicated on traffic which would be diverted (short-term) and traffic which would be lost to the new company in the long-term (vulnerable).

The factors considered by Witness Knuth for evaluating or attempting to evaluate whether or not a shipment is divertible are (Tr. 1073):

1. Type of equipment the shipment moved in.
2. The track location of the consignee.
3. The track location of the consignor.
4. Whether or not a team track was involved.
5. Whether or not the industry is open or closed to reciprocal switching.
6. The stop-overs involved.

Under questioning, (Tr. 1073-1074), he answered that single-line service and total transit time is also important.

Conspicuous by its absence from the list mentioned by Witness Knuth is a factor which he leaned on quite heavily for diversion purposes, namely Relations with the Industry. His explanation at Tr. 1088 of Good Relations with the industry was:

> "We know the shipper well. He knows the Frisco Railroad. We have established over the years a rapport with him. He buys our transportation service. We know him well and thus that is what we consider good relations with a customer."

At Tr. 1105, he said:

> "I believe the best way to establish good relationship with a customer would be to provide him with good services, whatever that might be. To follow through and be dependable on any negotiations that might occur in their business conduct. And generally servicing the customer in a manner that makes him believe that he is getting his money's worth for his transportation dollar. And I would think that would establish a good relationship with a customer."

At Tr. 1087:

> "We feel that service via the Nuco will be better than what it is via its present route of movement. We also have excellent relations with this shipper and by that we mean that with a railroad from Vancouver to Birmingham, Alabama, we feel we could get that business via that route".

Further, he stated at Tr. 1404-1406, that speed was not a factor as to reason for taking a diversion, it was the fact that the General Traffic Manager of the Company at Dallas, TX used to work for him and for that reason he feels quite certain if the merger is approved, the new company will get the business via that route and cut out the MN&S and North Western.

Both BN and Frisco traffic Witnesses respectively, made a weak attempt at reciting exactly what they meant by "Good Relations with Industry or Shippers". Witness Round in Verified Statement H-12, pages 27 and 28 under "2. Relations with Industry" defines this factor as encompassing certain criteria, e.g. rates, service, and equipment designed to meet particular needs, including a number of supportive services which will have an even wider range of application for the merged company, such as single-line rates, handling of loss and damage claims. Witness Knuth in his testimony did not clearly demonstrate what he meant by "Good Relations". His several references thereto do not have any internal consistency. The following is a list of transcript pages wherein "Good Relations" were utilized by him to explain judgments on divertible shipments:

Tr. 636-660-835-837-1042-1084-1087-1105-1148/1160-1341-1342-1344-1357-1358/1359-1365-1373-1374-1381-1383-1384-1400-1402-1405-1406-1417-1418-1421-1465/1467

It appears that the term "Good Relations" used in the many instances in this proceeding by the applicants has as many and somewhat different connotations, all apparently designed to cover a multitude of possible situations unanswerable by more definitive reasons for evaluating the divertibility or non-divertibility of shipments by NUCO from protesting carriers. The witnesses' use of the term is akin to "I never met a man I didn't like". "Good Relations" meant different factors at different times. In some instances the term Good Relations is used as an individual and separate evaluating factor, and in other instances it is used to cover more than one other evaluating factor, e.g. service, rates and equipment. Milwaukee Road submits that when all else failed as to listing specific criteria as the reason for taking or not taking a diversion, the application of the term Good Relations with Industry was used to rationalize diversion. In fact, on the applicants' SMS sheets "Relations with Industry" is given a separate section which appears to mean that it is a separate point and is not meant to cover more than one evaluating factor.

Milwaukee Road submits that reliance on the term Good Relations is a grave and fundamental error in traffic study evaluating, in that it re-introduces a wholly subjective factor incapable of objective determination - at the very time when the Commission is striving, through its new Railroad Consolidation Procedures, to reduce or eliminate subjectivity altogether.

(1) Applicants' Understatement of Losses to Milwaukee Road Is Proved by Milwaukee Road's Study.

Applicants in their Exhibit A-15 (vii)-Section 6, page 1, show a revenue loss of $3,054,960 in diverted traffic from the Milwaukee Road in contrast to the Milwaukee Road study Witness Brennan's Verified Statement H-112, showing $5,775,340 for divertible traffic, (page 8), reflecting a difference of $2,720,380 between the respective traffic diversion studies.

Witness Brennan's Verified Statement H-112, pages 10 and 11, refers to 6 instances where Witness Knuth did not admit of divertibility because of the erroneous assumption that Frisco did not have access to the facilities through reciprocal switching. Complete tariff reference was furnished in Witness Brennan's Verified Statement showing the applicants had the ability to reach the involved industrial facilities. In another instance, Witness Knuth, SMS 2559, Tr. 1127 was quite adamant in his position that a carload movement of machinery from Moline, IL to Silverton, TX (local FW&D station) was not divertible to the same extent that a movement SMS 2236 from the same origin to Lepanto, AR (Local Frisco station) was divertible in spite of the fact that after merger, carload movements from Moline, IL to both Silverton, TX and Lepanto, AR would be single-line operation subject to all of the ancillary benefits of improved and faster single-line service. The total additional revenue loss to the Milwaukee Road on these seven shipments would be $1,214,234. The involved Study Movement Sheets of the applicants' study as shown in Witness Brennan's Verified Statement H-112 on pages 10 and 11 and the amount of revenue understatement are:

STUDY MOVEMENT SHEET NO.		$ UNDERSTATED
4551)		
4552)		818,700
4553)		
4555		286,700
7335		41,700
5485		38,160
2559		28,974
	Total	1,214,234

Applicants' Study Movement Sheets (SMS) 2494 and 2495 cover shipments of tankage from Chicago, IL to Memphis, TN which moved via Milwaukee Road - Kansas City, MO - SLSF (FRISCO). They considered these carloads of traffic as divertible from the Milwaukee Road by the new route BN-SLSF based on track location of consignee and FRISCO relations with industry, even though shipment moved in Milwaukee Road equipment from a Milwaukee Road served industry. Also, on SMS Sheet No. 2587 (Tr. 1103), the applicants took a diversion on a carload of egg case fillers which moved from Gibson, IN, a Chicago, IL rate point to Springdale, AR served only by the FRISCO Railroad via IHB (Indiana Harbor Belt Railway owned 49% by the Milwaukee Road) - Bensenville, IL - Milwaukee Road - Kansas City, MO - SLSF (FRISCO) predicated on track location of consignee. Yet on SMS No. 2234 (Tr. 1123), covering a movement of dried bakery products from a Milwaukee Road served facility, open to reciprocal switching, to Springdale, AR a station served only by the FRISCO, applicants did not take it as divertible based on track location of consignor. Because the shipper's plant facility is open to reciprocal switching, the BN has just as much access to the shipper's plant as the Milwaukee Road and other Chicago District Railroads. Therefore, the movement could be single line to a local FRISCO station (NUCO after merger), and

the customers would enjoy the additional benefits of improved and faster single line service, reliability of services and the railroad would realize long term efficiencies and economies. Milwaukee Road submits this car is susceptible to being diverted from Chicago to Springdale via the NUCO single line haul thereby cutting the Milwaukee Road out of the route from Chicago to Kansas City, MO resulting in a further loss of revenue per car of $511 expanded to $51,100 under applicants 1% sample.

Applicants' SMS No. 7775 (Tr. 1110-1111) covers a movement (sic.) of toilet paper from Ft. Howard Paper Co., Green Bay, WI to Fort Smith Paper Co., Ft. Smith, AR in a Southern Pacific box car, routed Milwaukee Road - Kansas City, MO - SLSF. Witness Knuth took this movement as a divertible car to be routed via Milwaukee Road - Chicago, IL - BN - SLSF based on track location of consignee and FRISCO relations with shipper. Tr. 1343-1344, SMS 7796, starting at line 17 covers a movement of paper tissue from Fort Howard Paper Co., Green Bay, WI to Bolivar, MO a local FRISCO destination, routed North Western to St. Louis, MO - FRISCO to destination based on single line traffic and FRISCO's relation with the consignor. Under cross examination, Witness Knuth admitted that NUCO can divert this car via Green Bay and Western RR to East Winona, WI and merged company BN-FRISCO to destination (Tr. 1344). If applicants can divert a shipment from Green Bay, WI to Bolivar, MO via GB&W - East Winona, WI thence NUCO to destination which formerly moved C&NW, it is quite obvious they can divert a shipment from Green Bay, WI to Fort Smith, AR, SMS No. 7775, which formerly moved Milwaukee Road - Kansas City - SLSF via GB&W - East Winona, WI - BN - FRISCO (NUCO) to Fort Smith rather than via a short haul route of Milwaukee Road - Chicago - BN - SLSF, and, thereby cause a 100% loss of revenue for the Milwaukee

Road. The MILW would receive 28.85% of the revenue or $166 per car in lieu of our previous 53% of the revenue or $411 (settled revenue). In other words and according to the applicant's SMS 7775, there would be an additional amount of $166 per car MILW would suffer a loss on because of the possibility of diversion of traffic by the merged company from the Milwaukee Road in lieu of a short haul via Chicago. The additional understated revenue would be $166 x 100 expanded or $16,600.

Under applicants' SMS 1639 (Tr. 1118-1121), they did not take as a possible diversion a movement of di-calcium phosphate in a covered hopper car, from International Minerals and Chemical Co., Bonnie, Florida to Vigortone Co., Louisa, Iowa which moved via route of SCL Birmingham, AL-SLSF-Kansas City, MO-Milwaukee Road. However, under SMS 1641 (Tr. 1094-1097), applicants do contemplate a diversion of a car of pulpboard from Fernandina Beach, Florida to Louisa, Iowa from MILW Kansas City, MO haul to Louisa via Savanna, IL-MILW to Louisa, IA. The involved shipper, International Minerals & Chemical appeared as a witness for the applicants and testified to a belief the benefits of the proposed merger will greatly outweigh the occasional revenue losses for competitor lines. The shipper witness in Ex. H-31 pages 5 and 6 thereof draws attention to the fact that the proposed merger of the BN and Frisco will provide increased opportunities to achieve operating efficiencies, attract new business, more profitable long haul traffic, better utilization of equipment (in this case covered hopper cars of which applicants have a large fleet). The Shipper's witness, Thomas J. Regan, Corporate Staff Vice President, in his Verified Statement Ex. H-31, is vigorous in his support of the merger, and from the tone of his statement, it appears that IMC will support it to the extent that "the relatively small,

perhaps temporary disadvantages earlier cited [i.e., traffic diversions] seem to pale into insignificance when measured against the consolidation of two financially sound railroads into a coordinated, efficient, vital and viable transportation system whose long-term prospects appear to be bright" (Ex. 31, p. 7 and Tr. 1630A). This is an individual dedicated to doing what he can to help the merged companies, particularly because there is the possibility of effecting the distribution of Canadian potash in trainload quantities in the South and Southwestern United States at some future date (Tr. 1614). Under the circumstances, the Milwaukee Road submits that the merged company will divert this traffic from MILW-Kansas City haul via the Savanna Gateway connection, thereby causing a further loss in revenue of $118 per car and when expanded by 100 under the 1% sampling of the applicants it will amount to $11,800 annual loss to the Milwaukee Road.

Applicants' SMS 2550 (Tr. 1126-1127) covers a carload of mail order freight, all kinds (FAK) merchandise from Montgomery Ward, South Building, Union Street District, Chicago, IL open to reciprocal switching, to Montgomery Ward & Co. at Fort Worth, Texas via MILW-Kansas City, MO-SLSF-Fort Worth, Texas-T&P. The equipment used was a Milwaukee Road plain box car 40 feet long. Montgomery Ward Company traffic is time sensitive and for that reason MILW believes the BN-FRISCO will be able to offer single line, reliable and faster service which are some of the critical factors which they claim the shipping public can expect as a result of their merger. Under the circumstances, MILW is of the firm conviction that applicants understated the losses to the Milwaukee Road on this traffic by not taking it as a divertible shipment. The settled revenue Milwaukee Road received on this carload of traffic was $519 and

when expanded by 100 under their 1% sampling, it amounts to $51,900 as an additional annual revenue loss to the Milwaukee Road.

Applicants' SMS 2851 (Tr. 1149-1152) covers a carload movement of salt, in packages, from American Salt Co., Lyons, KS to United States Salt, Hopkins, MN which was routed SLSF (FRISCO)-Kansas City, MO-Milwaukee Road. The shipment was loaded in a FRISCO car and was placed for unloading at Milwaukee Road team track facility at 43 S. Washington St. in Hopkins, MN. Witness Knuth's only stated reason for not taking this shipment as a possible diversion was the track location of the consignee (team track) (see Tr. 1150, lines 6 to 10). Witness Knuth on Tr. 1149 stated that the U.S. Salt plant in Hopkins was served by the Milwaukee Road and that he did not know if the BN served the plant. It is rather incongruous that the witness discussed plant location at all, since he was aware that the shipment took team track delivery. Generally speaking, industries that have plant facilities on a railroad do not have their shipments routed to team track delivery. The BN serves Hopkins, MN and has team tracks available to the shipping public, therefore, the merged BN-FRISCO company would have single line service from Lyons, KS to Hopkins, MN with the ability for team track delivery the same as the Milwaukee Road. Because the receiver, U. S. Salt, distributes the product from the team track, it does not make a difference which carrier's team track they receive their merchandise on, particularly since the BN-C&NW and Milwaukee team tracks are all within about a 2 block radius. The extolled virtues of the BN-FRISCO merger, single line, faster transit time, reliability of service, equipment supply, etc. would certainly motivate the merged company's sales department to reach out for the handling of this traffic.

Thusly, an additional loss of revenue for the Milwaukee Road. Again, MILW submits that these facts support our position that the BN-FRISCO traffic study understates anticipated diversion of traffic from the Milwaukee Road of $553 per car and when expanded by 100 under applicant's 1% sampling, it amounts to $55,300 per annual loss to the Milwaukee Road.

Applicants' SMS Nos. 3633 and 3634 (Tr. 1152-1155) cover shipments of wheat flour from Minneapolis, MN to San Antonio, Texas via Milwaukee Road-Kansas City, MO-SLSF-Sherman, Texas-SP. Witness Knuth's only stated reason for not taking these two shipments as divertible shipments was "Unable to verify transit" (SMS 3633-SMS 3634). The fact that wheat tonnage originated at country points on the SOO Line RR and moved into Minneapolis, MN for conversion into product (wheat flour) forwarded by the Milwaukee Road to Kansas City, MO thence FRISCO to Sherman, Texas and SP to San Antonio, Texas would not preclude the BN from handling the traffic from Minneapolis as it is a party to the combination of rates on flour made over Kansas City, MO (in 1976=76 cents Minneapolis to Kansas City and 105 cents cwt. beyond to San Antonio, Texas) (Cf. Western Trunk Lines Committee Tariff No. 4049 (formerly 332) I.C.C. 4049 Southwestern Lines Freight Bureau Tariff No. 4026 (formerly No. 182) I.C.C. No. 4026). The previously stated benefits of the BN-FRISCO merger apply with equal force on this shipment, e.g. single line, reliable and faster service and improved utilization of private equipment. This traffic is definitely subject to possible diversion by the New Company resulting in an additional revenue loss for the Milwaukee Road. Our total settled revenue on these 2 carloads of traffic was $919 and when expanded 100 times under the applicant's 1% sampling, it results in an annual loss of $91,900 to the Milwaukee Road.

Applicants' SMS 5510 (Tr. 1157-1158) covers a movement of calcined plaster from Southard, OK, a local point on the SLSF, to an industry on the Milwaukee Road in Chicago, IL switching district open to reciprocal switching. The routing was SLSF-Kansas City, MO-Milwaukee Road. This is another instance where Witness Knuth decided not to taken the movement as a divertible shipment, (Tr. 1158) in spite of the fact that it can be a single line haul from Southard, OK to Chicago with delivery to the consignee through the benefit of reciprocal switching thereby eliminating the interchange delay at the Kansas City gateway and associated increase in transit time (Tr. 174). It will also result in service reliability and enable the merged company to enlist the other virtues of their proposed merger which the shipping public is told it can expect from a BN-FRISCO merger, as brought out in applicant's testimony and verified statements. These merger blessings have been previously cited in this Brief. Accordingly, the Milwaukee Road stands to lose another $350 per car and when expanded 100 under applicant's 1% sample it amounts to $35,000 annually.

Applicants' SMS 5669 (Tr. 1158-1159) covers a movement of rubber tires from Miami, OK to Albert Lea, Minnesota via SLSF (FRISCO)-Kansas City, MO-Milwaukee Road, shipment being in a FRISCO 50 foot box car. Witness Knuth did not take this as a divertible carload because consignee uses transit (Tr. 1159). This fact does not enter into the situation insofar as the BN and FRISCO are concerned since they do not serve Albert Lea, Minnesota, but they can short haul the Milwaukee Road via Dubuque, IA. (Cf. SWL Tariff 2006-J, I.C.C. 5056, Item 19800). This is another instance where the BN-FRISCO merger can work against the

Milwaukee Road as the origin of the shipment, Miami, OK, is a local FRISCO station and certainly applicants can influence the movement via their long haul because the shipment was tendered unjunctioned as shown on the SMS, and after merger they would be in a position to exercise their prerogative to insert the junction for interchange which provides its longest tariff route (Witness Round-Ex. H-12, page 32). Therefore, the New Company can divert the car and short haul the Milwaukee Road via Dubuque, IA. The freight charge on the shipment was $629.75 and MILW received 56% of the charges or $352.66. Under a short haul to the Milwaukee Road via Dubuque, IA, MILW would only get 16% in revenue instead of 56%. (Cf. Division Sheet No. SWL 100, ICC Docket No. 15234). Thus, the Dubuque short haul would result in revenue of $100.76 leaving a deficit of $251.80 per car. Rounding this amount off to $252 (nearest whole dollar) and expanding it 100 times in accordance with applicant's 1% sampling results in an annual loss of $25,200 to the Milwaukee Road.

Applicants' SMS 7298 (Tr. 1162-1163) covers a movement of plywood from Diboll, Texas to Des Moines (Clive) Iowa via Texas South Eastern-Lufkin, TX-Southern Pacific Transp.-Sherman-SLSF-Kansas City, MO-Milwaukee Road. Witness Knuth did not take this movement as a possible diversion under the mistaken assumption that Clive, IA is a local Milwaukee Road station and not available to the BN for reciprocal switching privileges (Tr. 1163). This is the same error he made on SMS sheet 5485, covering a movement of insulation board from Craig, OK to the same consignee at Des Moines (Clive) Iowa (Tr. 1155-1157). In Milwaukee Road Tariff CMSTP&P 4900-A, ICC No. 8428 issued May 10, 1976, Item 1015 shows Des Moines, Iowa switching district zones and Clive is in District 1 open to reciprocal switching subject to the charges

published in Item 6610. This judgmental error by Witness Knuth causes a further understatement of Milwaukee Road losses due to traffic diversions. Also, at Tr. 1163, Witness Knuth stated at line 9 that he either checked the Milwaukee Road Switching Tariff or MILW Industrial Guide, one of the two. In response to another question, by Milwaukee Attorney Sippel, "You are saying you did check?". Answer was "I did check to determine that this was a closed industry" (Tr. 1163 Line 12). From this he concluded that the only reason applicants could not divert the traffic would be because he believed Clive was outside the Des Moines, Iowa switching district and local on the Milwaukee Road and not available to reciprocal switching to the Burlington Northern (Tr. 1163 lines 13 to 18). It is apparent that Witness Knuth did not check the switching tariff, because if he did he would have found very simply and quickly that Clive is within the Des Moines, Iowa switching district open to reciprocal switching to all lines serving Des Moines. It is also apparent that he did not check MILW's Industrial Guide, (which admittedly has limited distribution to sales forces), for the issue in effect in 1976 under the entry Clive, Iowa refers "See Des Moines, Iowa" and under "Des Moines, Iowa (Clive)" it shows Midwest Hardwood Flooring & Plywood, the consignee, as located on the Milwaukee Road open to reciprocal switching. See Appendix A attached. This, again, appears to be another obvious attempt of applicants to understate their competitors losses due to their merger, if approved. The Milwaukee Road is convinced that the BN-FRISCO will be able to divert the traffic based on single line and faster service as well as reliability of service after receiving the car from the Southern Pacific RR at Sherman, Texas. The Milwaukee Road's loss per car would be $374 and when expanded 100 times under Applicants' 1% sampling, it results in an annual loss of $37,400.

Applicants' SMS 7740 (Tr. 1164-1167) covers a movement of lumber from Weyerhaeuser Company, Columbia Junction, Washington to Enid, OK which was routed CLC-Milwaukee Road-Kansas City, MO-SLSF. Witness Knuth declined to take this shipment as a possible diversion of traffic from the Milwaukee Road based on the fact that shipment moved in Milwaukee Road special equipment and Milwaukee Road relations with the industry (Tr. 1165 lines 7 to 12). MILW discounts his assumption that Milwaukee Road's relations with the industry will continue to influence movement via our line because the BN-FRISCO relations with the shipper appear to be much better and override those of MILW as evidenced by the fact that Weyerhaeuser Company had a witness appear in support of the proposed BN-FRISCO merger (Ex. H-50) even though approval of the merger by the ICC will reduce the Milwaukee Road's effectiveness to Weyerhaeuser (Tr. 3379). The second reason, that Milwaukee Road special equipment was used (Tr. 1165) is not an absolute deterrent to the merged company diverting the traffic away from the Milwaukee Road. Without doubt, applicants under their proposed merger, if approved, will continue to increase the amount of special equipment they will have for large shippers with very long haul traffic. The witness for Weyerhaeuser at Tr. 3385 stated that if the merger were consummated and there was a single line haul there would be more flexibility in car supply; at Tr. 3387, "Service would override" the shipper's policy of giving a long haul to the origin or destination carrier. In this case, from Columbia Junction, Washington to Enid, OK the movement would be single line beyond Rocky Point, WA connection with CLC and, with applicants' improved schedules and service; no interchange at Kansas City between them; equipment supply; and the predicted (Round Tr. 707) highly motivated and increased

sales effort, will be successful in winning as much of Weyerhaeuser's business they can possibly get. And to reiterate, this shipper very vigorously supports the BN-FRISCO application for merger. Milwaukee Road revenue on the movement was $1573 per car and when expanded 100 times under the Applicants' 1% sampling it amounts to an additional annual loss to the Milwaukee Road of $157,300.

Applicants' SMS 7722 (Tr. 1172-73) covers a movement of lumber from Weyerhaeuser Company, Snoqualmie Falls, WA to Marshfield, MO routed Milwaukee Road-Kansas City, MO-SLSF. Witness Knuth did not take this as a divertible carload of traffic based on "Milwaukee Road's relations with Industry and track location of the consignor". Marshfield, MO is a local station on the Frisco Railroad and as such this means the BN will have a "relationship with the shipper" at least equal to that of the Milwaukee Road and in all probability a better relationship as evidenced by the fact that the shipper at Snoqualmie Falls had a witness appear in support of the BN-Frisco merger (Ex. H-50). Additionally, because the destination is a local Frisco station it appears that the BN and Frisco will have a better relationship with the consignor and the consignee (Ex. H-12, p. 30) since after merger they will serve both origin and destination. Single-line, faster and more reliable service by the merged lines will serve to draw this traffic to their line. Even though applicants allege a traffic allocation at the various Weyerhaeuser plants it does not diminish the fact that the foregoing benefits of the merger will take place because of better service. Milwaukee Road's settled revenue on this car was $1,790 and expanded by 100 under their 1% sampling means that the Milwaukee Road will lose $179,000 annually through diversion of traffic to the BN-Frisco.

Applicants' SMS 7801 (Tr. 1174-1178) covers a movement (sic.) of toilet paper from Procter & Gamble Co., Green Bay, WI to Springfield, MO in a Milwaukee Road free running boxcar, via Milwaukee Road-Kansas City, MO-SLSF. Witness Knuth did not take this as a divertible car because of track location of the consignor (GB&W-CNW-MILW) according to his study movement sheet. At destination, the consignee is located on the SLSF. While Mr. Knuth did not take this car as divertible, he did on SMS 7791 (Tr. 1340) take as divertible a carload of toilet tissue from Procter & Gamble at Green Bay, WI to Fulco, GA in an SCL plain boxcar via GB&W-Winona-BN-Frisco to Birmingham, AL-SCL even though carload moved North Western-St. Louis, MO-Frisco to Birmingham and Seaboard Coast Line to destination. The possible diversion of the car through Winona is because of single-line and faster service from Winona to Birmingham (Tr. 1341). Witness Knuth admitted that Procter & Gamble Company has several facilities on their railroad and that Frisco's relations with the shipper are good (Tr. 1342). In fact, Robert L. Rinner of Procter & Gamble Company filed Ex. H-34 in support of the proposed merger because "The merger of the SLSF and the BN will provide access to a much larger car fleet and a considerably expanded area of direct service" (Ex. H-34, p. 2(II)). Under the circumstances, if the BN and Frisco in conjunction with the GB&W can divert a car away from the C&NW via the Winona gateway because of single-line and faster service, they will in all probability after merger divert a similar movement from the Milwaukee Road for the same reasons, particularly in light of supporting shipper's verified statement filed on their behalf. The Milwaukee Road's settled revenue on this shipment was $378 and when expanded 100 times by the applicants' 1% sample it results in an annual revenue loss of $37,800 for the Milwaukee Road because of BN-Frisco diversion of traffic from its line.

Applicants' SMS 6622 covers a movement of potassium chloride from Kalium, Saskatchewan, Canada to Vertagreen, AL in shipper's private hopper equipment via route of CN-Ft. Frances-DWP-Duluth-Milwaukee Road-Kansas City, MO-SLSF-Memphis-Southern. Witness Knuth did not take this as a possible diversion from the Milwaukee Road because of "Milwaukee Road's relations with industry" (SMS 6622). He admitted, however, that both shipper and consignee has route input on the shipment (SMS 6622). Because the traffic moves in shipper's private equipment the shipper must be most anxious to have improved turn-around time to reduce its car leasing costs. The proposed benefits to the shippers of single line and faster service all the way from Duluth to Memphis will permit the consignee to control and maintain inventory at its fertilizer mixing plant and be in a better position to make distribution of the product to market areas. The catch-all phrase "Relations with Industry" is overridden by the more practical aspects of single line and faster service which improves turn-around time on private equipment. The Milwaukee Road's settled revenue on this shipment was $731 per car and expanded 100 times by 1% sampling of the applicants indicates that this is another understatement of Milwaukee Road's revenue loss to the merged company in the annual amount of $73,100.

The foregoing analysis of Witness Knuth's selection of carloads of traffic which he takes as possible diversions from other carriers, particularly the Milwaukee Road, and his testimony on cross examination serves to bear out the fact that one man's wine is another man's vinegar.

The 14 additional Study Movement Sheets, which the Milwaukee Road studied for diversion, and the amount of potential loss of revenue, $2,037,634, coupled with the amount of diversion revenue loss to the Milwaukee Road admitted in applicants' Exhibit A-15 of $3,054,960, results in a total loss of revenue to the Milwaukee Road, under the BN-Frisco and Milwaukee Road Traffic studies on divertible traffic only, of $5,091,794.

Compare this amount with the figure of $5,775,340 that the Milwaukee Road claims as diversion loss as a result of its own traffic study (H-112, p. 8). A small difference of only $682,746 exists. Milwaukee Road submits that its study of the BN-Frisco and Milwaukee Road traffic studies show a consistency of approach as to which traffic is subject to possible diversion. Following is a Table listing the involved Study Movement Sheets and the amount of understatement in dollars:

Study Movement Sheet No.	$ Understated
4551)	
4552)	
4553)	
4555)	1,214,234
7335)	
5485)	
2559)	
2234	51,100
7774	16,600
1639	11,800
2550	51,900
2851	55,300
3633)	91,900
3634)	
5510	35,000
5669	37,400
7298	37,400
7740	157,300
7722	179,000
7801	37,800
6622	73,100
	2,037,634

Amount Revenue Loss to Milwaukee Road in Applicants Exhibit A-15-	3,054,960
Adjusted Total Loss=	5,092,594
Milwaukee Road Loss Exhibit A-15=	5,775,340
Difference Between Milwaukee & BN-Frisco stated traffic loss =	$ 682,746

The close correlation between applicants' study of Milwaukee Road "divertible" traffic, as corrected above, with Milwaukee Road's own "divertible" traffic study is no coincidence. It proves the fact that applicants' traffic study was deliberately understated and is of no evidentiary weight. We now turn to examine Milwaukee Road's own traffic study for this proceeding.

(2) Milwaukee Road's "Vulnerable" Category Valid

The "Vulnerable" category utilized by the Milwaukee in conducting its traffic study, to identify and quantify the longer term impact of the proposed transaction is valid and every consideration should be given to the implications as a result thereof. The Milwaukee Road accomplished the tasks of identifying and quantifying the longer term impact of the proposed merger on its traffic and revenues, which applicants admittedly made no effort or attempt to do. In other words, they gave absolutely no consideration to the "synergistic effect" of this proposed merger on other carriers, although admitting it will occur, viz.: Mr. J. Round, Traffic Witness for Burlington Northern testified as follows (Round, Tr. 601)

> Q. Now, I could extend this at some length, Mr. Round. It is true that at all points at which you have common points with other carriers, either Frisco and the BN, that where there is traffic in which you have not

participated today that is moving between common points, all that traffic would be excluded from your diversion study?

A. Yes. If the BN or the Frisco or the C&S or the FW&D (have not) participated in the route it would be excluded, yes, sir. [Emphasis added].

Q. So out there as far as you are concerned, there is an unknown quantity of traffic that is subject to potential diversion in addition to the traffic that is part of your diversion study? [Emphasis added.]

A. There is an unknown quantity of traffic out there that, yes, I would say would potentially be available to the new company [Emphasis added].

Similarly, Mr. Knuth, Traffic Witness for the Frisco testified as follows (Tr. 1074-1076):

Q. Would it simply be then that since the traffic study is based on the data which is in the computer records of both applicants that such information on traffic moving entirely over other rail carriers is not in those computer records? [Emphasis added]

A. True. [Emphasis added]

Q. Then I think it is fair to conclude, then, is it not, that I will simply ask the question ..... have applicants to your knowledge, made any efforts or attempted to quantify these possible diversions of traffic that are moving entirely over other rail carriers lines? [Emphasis added]

A. We did not. [Emphasis added]

It is this "unknown quantity of traffic out there that is potentially available to the new company" that the applicants made no effort or attempt to identify or quantify; it is this traffic that the Milwaukee Road has identified and quantified, contends and submits is "Vulnerable" to eventual diversion; it is this traffic, which if this merger is mistakenly allowed, will inflict the "synergistic effect" upon the Milwaukee Road.

Mr. Round's vain attempt to discredit the Milwaukee "Vulnerable"

category is found in his Rebuttal Testimony Exhibit H-171 at page 63.

> "..... Mr. Brennan's concept of "Vulnerability" has already occurred on Milwaukee as evidenced by their internal deterioration, bankruptcy, and their struggle over the past year and a half to provide equipment and service. This has all occurred before the fact of a BN-Frisco merger".

Mr. Round would thus have the Commission believe that after merger, applicants will not exert every effort to capture new traffic not now moving on their lines, but, as seen, his and others' previous testimony contradicts this contrived opinion.

Mr. Round has been and is presently in a position to know that the phenomenon of "vulnerability" occurred once before on the Milwaukee and had a hand in causing it. In his Verified Statement, Exhibit No. H-12 on pages 1 and 2 he testified:

> "On March 2, 1970 when the Northern Lines Merger became effective, I was appointed Administrative Assistant to the Assistant Vice President Sales, West .... on October 1, 1971, I was appointed to my present position. As Director of Sales Administration..... I have consequently become very familiar with the entire Burlington Northern system, its traffic patterns, long-haul routing opportunities, divisions of revenue, relationships with its customers and with other rail carriers..... all in order to satisfy BN's primary sales objective..... an increase share of the available transportation market." [Emphasis added]

The BN, largely due to the Northern Lines Merger has subsequently achieved their objective of an increased share of the transportation market at the expense of competing carriers, particularly that of the Milwaukee Road as stated in Mr. F. K. Brennan's Verified Statement Exhibit No. H-112 pages 12 and 13:

> "The Commission should not regard as mere rhetoric applicants' repeated boast on this record of the "synergistic effect" of the merged railroads' future success in wresting traffic from competitors. Milwaukee Road's

> experience since 1970 of the Northern Lines merger reveals that traffic losses projected by Milwaukee Road at that time fell far short of what actually occurred. In our Burlington Northern application, F.D. 21478 (Sub No.4), the prepared testimony of our Vice President-Sales and Service estimated that loss of traffic previously interchanged by Milwaukee Road with the Northern Pacific, Great Northern - and Chicago Burlington and Quincy and not anticipated as a loss to Milwaukee Road of some $16 million annually."
>
> "At today's average revenue per car to Milwaukee Road, that loss uncompensated by any form of protective condition, is over $19 million annually. Form this experience, and applicants' own plans of record, the Commission should regard our traffic study as conservative."

The proposed merger will only strengthen the applicants to increase further and more emphatically their share of the transportation market at the expense of competing carriers. As the strength of the applicants increases with the advantages the proposed merger will create, the more "vulnerable" the Milwaukee Road's traffic becomes, as it inevitably becomes weaker; the weaker Milwaukee Road becomes, the more "vulnerable" its traffic is to applicants' aggrandizement. Mr. Round's criticism of the "vulnerable" traffic concept is completely unfounded. This traffic category exists and is real. Mr. Round's own colleague, Mr. A. E. Michon, in his Verified Statement, Exhibit No. H-198 on page 3 clearly addresses himself to this very possibility:

> ".... Thus, Milwaukee could deprive Burlington Northern of potential traffic; for example, to points in Illinois, Iowa, Southern Minnesota and perhaps even the major markets in the Gulf area. None of these possible losses have been alluded to....."

Upon cross-examination of Mr. Michon regarding the vulnerability of this BN traffic, he testified Tr. 7187-7188):

> Q. You are not attacking through his study per se based on a 1976 traffic sample, are you?

A. No Sir. I am just saying our planning numbers used in forecasting, coming as they do directly from the shippers involved, more accurately portray the future than does an historical study. [Emphasis added]

Q. You are not suggesting that the future traffic of the Burlington Northern based upon these diversions with these shippers, would prove to be vulnerable to Milwaukee Road than a historic study would indicate? [Emphasis added]

A. Yes. [Emphasis added]

Mr. Michon further testified upon cross-examiniation regarding the vulnerability of traffic as follows (TR. 7194):

Q. You begin the first full paragraph with the words "There is a second category of potentially divertable". Do you mean by that to suggest all the previous discussions other than those relating directly to the three sources identified on Page five is vulnerable traffic presently carried by Burlington Northern which Milwaukee Road might reach through a possible interpretation of its condition six?

A. Yes, I am saying that all those indicated in the table on page five are those that we are quantifying in that instance as possible revenue diversions from the BN ....

Furthermore, BN counsel himself showed acceptance of the "vulnerable" concept, although he misapplied it, in questioning Milwaukee Road witness Brennan concerning his Ex. H-113 traffic study supporting the Sub-22 trackage rights application (Tr. 5135, lines 18-19).

From all of the above discussion, it is clearly evident that Milwaukee's study of the traffic that is "vulnerable" and will create

the desired "synergestic effect" for the applicants is valid and necessary for consideration of the public interest in applicants' merger proposal. BN knows of the "vulnerability" of certain traffic, and plans to capture it following merger if possible. Milwaukee Road's traffic study must be given full evidentiary value.

C. Milwaukee Road Traffic Study is Accurate, Precise and Valid

(1) The Traffic Sample

After preliminary traffic studies were conducted it became quite apparent that the proposed merger would have an extremely serious impact on Milwaukee Road's present and future traffic and revenues, not only because of the possible loss of business handled jointly with the Frisco and Burlington Northern, but also that traffic which the merged BN/Frisco, because of the tremendous advantages the merger would create, could divert from the Milwaukee Road and other connecting lines. (Brennan Verified Statement Exhibit No. H-112)

Because of the inevitable harm this merger would inflict on the Milwaukee Road and the fact the ICC "Railroad Consolidation Procedures" require carriers to utilize probability sampling techniques, the services of Dr. Paul Meier, University of Chicago, Department of Statistics, Chicago, Illinois were retained to design and supervise the drawing of Milwaukee Road's traffic sample to reflect accurately the traffic which would be involved and studied. (Meier Verified Statement Exhibit No. H-111)

To conduct and process this study, four full-time highly-trained and qualified Sales Department personnel were assigned to assist in this endeavor. (Milwaukee Road Exhibit A-15(iii) Page 3) The initial meeting with Dr. Meier involved these people as well as personnel from various other involved Departments. (Brennan Verified Statement Exhibit No. H-112 Page 4) The geographic significance of the proposed BN-Frisco Merger as it related to Milwaukee Road traffic flows was explained. Because of the geographic significance, it was concluded that a sample based on origin-destination rate territory combinations would be drawn from our 1976 Traffic Data tapes. (Meier Verified Statement Exhibit No. H-111 Appendix B) The exact methodology, testing and control utilized in drawing the sample is explained in more detail in Dr. Meier's Verified Statement, Exhibit No. H-111.

The Headquarters traffic study team, as well as other involved Departments, followed Dr. Meier's instructions to the letter. There were absolutely no deviations established on this record. Whenever

questions or misunderstandings arose, they were immediately clarified by telephone conversations and/or meetings followed by memoranda of understanding. (Meier Verified Statement Exhibit No. H-111 Page 8.) The methodology, testing and control devices employed by Dr. Meier withstood, beyond doubt, vigorous, but very brief cross-examination by applicants' Counsel (TR. 4784-4912). This fact is to be contrasted to the conspicuous absence of other cross-examination of Dr. Meier by applicants' Counsel, in that Dr. Meier was also retained by protestant C&NW to perform a similar service for that carrier. Dr. Meier also submitted a Verified Statement in that particular instance and is identified as Exhibit No. H-92 (Tr. 4456). Cross examination of Dr. Meier's testimony for the Milwaukee Road's study served only to establish that the sample drawn from Milwaukee Road's 1976 traffic under his direction and supervision is unquestionably correct and statistically accurate.

(2) Milwaukee Road's Evaluation Process

The complete information on each individual record or shipment in the sample was printed on a four-part "Field Information Form" designed for this particular traffic study. Part 1 of the Form was retained in the Headquarters office, Part 2 of the Form was forwarded to the Field Sales office responsible for the territory in which the particular shipment originated with Part 3 of the Form being forwarded to the Field Sales Office responsible for the territory in which the shipment terminated. Part 4 of the Form was utilized for "Controlled" traffic, where applicable,

(controlled traffic is defined as traffic being routed by an office or industry at a point other than the origin or destination point), and was forwarded to the Field Sales office where the traffic is controlled, other than the origin or destination point of the shipment. The Field Sales offices were instructed to return the completed forms to the Headquarters office by a specified date for further study and evaluation. Specific instructions for the completion of the Field Information Forms were given to the Field Sales offices. (Milwaukee Road Exhibit A-15 Appendicies 1 and 2.) These instructions were complied with explicitly (Ex. A-15 (v)).

The waybill information appearing at the top of the Field Information Forms was also furnished to the Headquarters Staff in a separate print-out. While the Field Information Forms were being completed with the necessary information and evaluated by Field Sales representatives, the Headquarters Staff conducted an evaluation of the individual movements on the separate print-out to determine the potential diversion from the Milwaukee Road. Upon completion of the evaluation and determination of potential diversion of individual movements, a request was made of the Accounting Department to draw from its files the waybills and revenue settlement abstracts convering these movements to insure that our printing information was accurate. (Brennan testimony TR. 4940-4941)

After the completed Field Information Forms were returned from the respective Field Sales offices, a thorough check was made to ensure that all copies were returned and properly completed. (Brennan, Ex. No. H-112 page 5.) They were then reassembled and the waybills and revenue

abstracts drawn from the Accounting Department files were then matched with the appropriate Field Information Form. The Headquarters Staff then reviewed and re-evaluated each individual movement on the basis of the Field Sales input and the drawn waybills and revenue settlement abstracts. (Brennan, Ex. H-112 page 5.)

Thus three levels of the evaluation process were involved: The initial Field Sales office personnel evaluation, the Headquarters Staff consisting of thoroughly trained and experienced Sales Department personnel, as an intermediate evaluation, and the final evaluation by the Milwaukee Road's traffic Witness, Mr. F. K. Brennan. (Milwaukee Road Exhibit No. A-15 (iii) pages 1-4.) The entire evaluation process required objective consideration being given to traffic diversion criteria developed for this proceeding.

Each selected sample movement was evaluated in this manner. These criteria were (Brennan, Ex. H-112, page 6):

1. Origin and/or destination served by merged BN-Frisco.
2. Merged BN-Frisco physically switches industry at origin.
3. Merged BN-Frisco physically switches industry at destination.
4. Merged BN-Frisco physically switches industry at both origin and destination.
5. Superior service via merged BN-Frisco
6. Merged BN-Frisco presently participates in route.
7. Improved car supply.
8. Improved utilization of private equipment.
9. Elimination of accessorial charge (Switching at intermediate point).
10. Similar movement in merged BN-Frisco Study.
11. Merged BN-Frisco equipment used.

Full value was thus given to the merged status of applicants in contrast to their Witness Knuth who gave no consideration to Frisco's expanded ability to reach new traffic after merger. (Knuth, Tr. 1130-32)

As previously stated, the traffic study was conducted with two objectives in mind: one, to measure the immediate impact on the Milwaukee Road upon consummation of the proposed merger, and, two, to identify the longer term affect of the proposed merger. In order to accomplish these objectives, the term "Divertible" was utilized to determine the immediate impact and the term "Vulnerable" was coined to measure the additional longer term affect of the proposed transaction. (Brennan, Ex. H-112, page 7)

Based on Dr. Meier's sampling technique, 9,805 movements were selected as the sample to be studied and evaluated for potential diversion and loss to the Milwaukee Road. Included in the 9,805 movements were a total of 3,065 movements which were identified as non-involved traffic and which could not possibly be considered as a potential loss to the Milwaukee Road. The non-involved movements included all Milwaukee Road local traffic, as well as traffic moving between certain geographical territories which could not be affected by the proposed merger. This traffic was not studied or evaluated. The remaining 6,740 records or movements were processed, studied and evaluated in the manner previously described. (Brennan, Ex. H-112, page 7.)

The following table reveals the results of these studies which represents the anticipated losses the Milwaukee Road will sustain if the proposed merger is approved. (Milwaukee Road Exhibit A-15 (vii-A, B, C):

TABLE II

	DIVERTIBLE		VULNERABLE		TOTAL	
Traffic	Cars	Revenues	Cars	Revenues	Cars	Revenues
Interline Forwarded	4,750	$2,828,370	5,840	$4,125,410	10,590	$6,953,780
Interline Received	4,660	2,251,370	1,690	628,990	6,350	2,880,360
Overhead	1,070	695,600	5,120	3,560,190	6,190	4,255,790
Total	10,480	$5,775,340	12,650	$8,314,590	23,130	$14,089,930

As previously stated, the Milwaukee Road continues to operate a system substantially identical to that which was operated in 1976, the year utilized for our traffic study. The competitive situation of the Milwaukee Road and Burlington Northern-Frisco continues to exist and will until the Reorganization Court or the Commission order differently or "cashlessness" dictates other alternatives. Therefore, the Milwaukee Road traffic data base of 1976, which reveals a loss of $14+ million is just as valid and real today as it was in 1976.

(3) Cross-examination of Milwaukee Road Traffic Judgments Cast No Shadow Thereon

Applicants' counsel in their cross-examination of Milwaukee Road's traffic Witness Brennan (Tr. 4912 - 5179) attempted, without success, to discredit his judgments and conclusions as to the divertibility of shipments in Milwaukee Road's traffic sample. The record reveals that, beyond all doubt, Witness Brennan's judgments and conclusions are sound, reasonable and justifiable, and will result in the projected loss of revenue to the BN-Frisco as a merged company.

The following examples of cross-examination of Witness Brennan on specific records of movements in Milwaukee's traffic sample are illustrative.

Milwaukee Road F.I.F. (Field Information Form) page 6455 (Tr. 4966) involved a movement of shingles from Port Alberni, B.C., Canada to Houston, Texas which was routed CP-SOO-Minneapolis-Milwaukee Road-Kansas City-KCS-Shreveport-SP. Witness Brennan's judgment was that after merger this movement would be vulnerable to loss based on the following criteria:

A. Nuco will serve the destination.

B. Superior service to the destination from junction point.

C. Improved car supply.

Through the proposed merger, Nuco will serve the destination with a much longer haul and superior single-line service from the junction point Minneapolis to Houston. Nuco will also have the capability of serving the consignee located on the Houston Belt and Terminal through reciprocal switching. Nuco can, because of their superior car supply, assign and furnish cars to the origin carrier in anticipation of a haul.

While applicants' counsel attempted to discredit Witness Brennan's judgment on this movement (Tr. 4966-4968), Counsel conveniently disregarded Witness Brennan's reasons as outlined above for judging this movement as vulnerable to loss. Tr. 4967 line 19, applicants' counsel asked:

> "Well, on this kind of a movement, I take it there were existing, what you call single-line routes via the CP, SOO, Minneapolis, Rock Island, for example, or the CP, SOO, Chicago, Santa Fe, or the CP, SOO, Chicago, Missouri Pacific, or the CP, SOO, Chicago, Rock Island. They exist today, don't they?"

This question crystallizes a big part of Milwaukee's future problems after merger. MILW knows from its experience that these existing single-lines do not help the Milwaukee Road's cause. Adding one more single-line service between Minneapolis and/or Chicago on the one hand and Houston and/or Dallas on the other only intensifies Milwaukee Road's problem.

Milwaukee F.I.F. pages 3289 (Tr. 4971) and 3284 (Tr. 4977) involved movements of Plastics from Houston, Texas to Bartlett, Illinois which were routed ATSF-Kansas City-Milwaukee Road. Because of the proposed merger, Witness Brennan concluded that these movements were vulnerable to loss to the Milwaukee Road for the following reasons:

A. Nuco will serve the origin point. (FIF 3289 and 3284)

B. Superior service from origin to junction point. (FIF 3289 and 3284)

C. Improved car supply. (FIF 3289 and 3284)

E. Improved utilization of private equipment. (FIF 3289)

The consignor is located on and switched by the Port Terminal Railroad Association (PTR), a switch carrier, which means that the merged BN-Frisco will be capable of serving the industry through reciprocal switching. Once the merger is approved, Nuco will have the capability of providing faster, single-line road haul service from Houston to Chicago, IL thence-MILW thereby short-hauling the Milwaukee in spite of the fact that Bartlett, IL is a local station on the Milwaukee Road. This shipment was loaded in private equipment and the faster single-line haul service will provide for better utilization of private equipment, an advantage that Nuco will surely exploit. Regardless of the fact that this moved in private equipment, Nuco again will have the advantage of a better car supply should it be necessary to furnish railroad equipment.

Applicants' counsel again conveniently disregarded these facts in their cross-examination of Witness Brennan (Tr. 4971 - 4978), but rather engaged in a line of questioning that avoided the real issue of these movements being vulnerable to a short-haul to Milwaukee Road if the proposed merger is consummated.

Milwaukee Road F.I.F. page 4278 (Tr. 4978) covers a movement of Isopropanol from Pasadena, Texas to Cordova, Illinois which was routed SP-Shreveport-KCS-Kansas City-Milwaukee Road. Witness Brennan's conclusion is that after merger this traffic is vulnerable to loss for the following reasons:

A. Nuco serves origin.

B. Superior Service from origin to junction point.

C. Improved car supply.

E. Improved utilization of private equipment.

As explained in the previous example, Nuco will have the ability to serve the consignor through reciprocal switching and will have the ability to provide a faster single-line, long-haul service from point of origin to junction point with the Milwaukee Road which will allow Nuco to short-haul Milwaukee Road. This coupled with the fact that the shipment moved in private equipment will provide the shipper with a much better utilization of his equipment.

Again, counsel for the applicants ingnored the real facts (Tr. 4978 - 4980) as to why Witness Brennan judged this movement to be vulnerable. He rather engaged in a line of questioning as to the opinions of the field sales evaluations and Witness Brennan's final evaluation, thus circumventing the real issues which make this traffic vulnerable to the synergistic effect this merger will create.

Milwaukee Road F.I.F. page 3781 (Tr. 4980) involves a movement of Anhydrous Ammonia from Texas City, Texas to Sheldon, Iowa which was routed ATSF-Kansas City-Milwaukee. Witness Brennan's final evaluation after reviewing all the facts was that this traffic was vulnerable to diversion and ultimate loss for the following reasons:

A. Nuco serves origin point.

B. Superior service via Nuco from origin point to junction with Milwaukee Road.

C. Improved car supply.

E. Improved utilization of private equipment.

As indicated in the 2 previous examples, Nuco will serve the origin point of this shipment and will possess the ability to serve the consignor through reciprocal switching. Again with applicants' admitted improved single-line, long-haul service, coupled with their ability to provide better utilization of private equipment they will render this traffic extremely vulnerable to their participation and short-hauling of the Milwaukee Road.

Again, applicants' counsel engaged in cross-examination of Milwaukee Road's traffic Witness Brennan (Tr. 4980 - 4984), that failed to discuss the real issue of this traffic being vulnerable.

Reference is made to Milwaukee Road F.I.F. 3190 (Tr. 4996) movement of Superphosphate from Bonnie, FL to Montevideo, MN which was routed SCL-Birmingham-Frisco-Kansas City-Milwaukee Road. Witness Brennan submits that this movement is divertible for the following reasons:

5. Superior service via Nuco.
6. Nuco presently participates in the route.
7. Improved Car supply.
10. Similar movement in Nuco traffic study.

Witness Brennan concluded that inasmuch as Nuco presently participates in the route they will have the ability, because of their longer single-line service (Birmingham to Minneapolis) to short-haul the Milwaukee Road. Witness Brennan also found that the BN/Frisco had very similar movements in their study. SMS forms No's. 1641, 1642 and 1643 are prime examples of the influence which Nuco will be able to exert on shippers and consignees. This instant example can not be excluded from their influence.

The response to applicants' counsel by Witness Brennan (Tr. 4996 - 4998), substantiates his judgment. Other similar examples are F.I.F. No's. 2136 (Tr. 4998) and 268 (Tr. 5002), and applicants' counsel's cross-examination of Witness Brennan (Tr. 4998 - 5003). Counsel again avoided the facts of Witness Brennan's contention that this traffic is divertible and subject to a short-haul to Milwaukee Road after merger.

Milwaukee Road F.I.F. No. 2694 (Tr. 5003) covers a movement of Petroleum Asphalt from Tulsa, Oklahoma to Earling, Iowa which was routed SLSF-Kansas City-Milwaukee Road. Witness Brennan views this shipment as divertible, subject to a short-haul, and will, after merger, be routed Nuco-Council Bluffs-Milwaukee Road for the following reasons:

1. Origin served by Nuco.
2. Nuco physically switches industry at origin.
5. Superior service via Nuco.
6. Nuco presently participates in route.
8. Improved utilization of private equipment.

Applicants counsel's questioning did not deal with the real issues.

Milwaukee Road F.I.F. page 6082 (Tr. 5008) involves a movement of Furniture from Fort Smith, Arkansas to Billings, MT which was routed KCS-Kansas City-Milwaukee Road. Witness Brennan's judgment concluded that this shipment is divertible and subject to a complete loss for the following reasons:

1. Origin and destination served by Nuco.

3. Nuco physically switches industry at destination.

5. Superior service via Nuco.

7. Improved car supply.

Applicants' counsel spent considerable time on "stop-off" comment by origin agency, line 3, Tr. 5009. This is a general reaction and comments of any railroad sales office that has any experience working with furniture industries. The underlying papers, waybills and abstracts, not available to the origin representative, were available and known to the applicants' study team. These documents show that this shipment made no stop-off, but was a straight movement from Fort Smith, AR to Billings, MT. The Fort Smith shipper is served by the MP. The car moved KCS-MILW. Obviously, the soundness of Witness Brennan's findings that after merger these moves will be via Nuco left applicants' counsel with no supportable issues.

Milwaukee Road F.I.F. page No. 736 (Tr. 5011) covers a movement of Prepared Cooked Fish from Bellingham, WA destined to Greenville, SC and was routed PSFL-Bellingham-Milwaukee Road-Louisville-L&N-SCL-GR&N. Witness Brennan concluded that this movement is vulnerable to diversion, and will be routed after merger via Nuco-Birmingham-SCL-GR&N for the following reasons:

A. Nuco serves the origin point.

B. Superior service from origin to junction point.

C. Improved car supply.

E. Improved utilization of private equipment.

The objectivity and realism of Witness Brennan's findings in this sample study is further strengthened by the circumstances of the shipper being served by the BN. The initial carrier of the shipment was Puget Sound Freight Lines thence Milwaukee Road. Obviously, this shipper will avail himself of the benefits of Nuco: flexibility of car supply, single-line service to the Memphis or Birmingham gateway, for superior service thereby gained.

Milwaukee Road F.I.F. page No. 4175 (Tr. 5048) covers a movement of Bottle Carrying Cartons from Clinton, IA to Miralia, GA which was routed Milwaukee-Louisville-L&N-SCL. Witness Brennan concluded that this movement is vulnerable to diversion for the following reasons and the new route will be Nuco-Birmingham-SCL.

A. Nuco serves point of origin.

B. Superior service from point of origin to junction point.

C. Improved car supply.

In addition, the BN serves the shipper jointly with Milwaukee Road. The objectives of the proposed BN/SLSF merger strongly support Witness Brennan's realism in this study. Applicants' counsel, (Tr. 5048), did not deal with the real issues of the merger improved car supply, single-line service to the Birmingham gateway and the synergistic effect of the merger. Obviously, these factors will influence the shipments away from Milwaukee Road to applicants, following merger.

Milwaukee Road F.I.F. page No. 2468 (Tr. 5049) involves a movement of Corn Syrup from Clinton, IA to Paris, TX and was routed Milwaukee Road-Kansas City-Frisco. Witness Brennan judged this shipment to be vulnerable to a complete loss after merger and it will be routed via Nuco direct for the following reasons:

A. Nuco serves origin and destination.

B. Superior service via Nuco origin to destination.

C. Improved car supply.

E. Improved utilization of private equipment.

F. Nuco presently in route.

The underlying papers, waybills and abstracts, show some tonnage in this shipment originated at Rands, IA with transit at Clinton, IA. The consignee, Merico, Inc. in Paris, TX, is located on the SLSF and will have a strong voice in how these shipments will move, especially since the shipper Clinton Corn Products is served jointly by the BN-C&NW-MILW. Witness Brennan took into account Witness Round's SMS 21533 (Tr. 1041) covering a shipment from Clinton, IA to Augusta, GA about which Witness Round in testifying on taking a diversion (line 16, Tr. 1042), says "We have good relations with this particular customer. This was a transit shipment where there was inbound transit partially from C&NW and partially BN that applied to outbound movement". It is not unusual for transit to apply via an outbound carrier different from the inbound transit carrier; therefore, with: good relationships, improved flexible car supply, single-line haul, Nuco serving both shipper and consignee, this shipment is extremely vulnerable to the merged BN/SLSF synergism.

Milwaukee Road F.I.F. page No. 2787 (Tr. 5103) covered a TOFC movement of Freight, All Kinds from St. Paul, MN to Miami, FL and was routed Milwaukee Road-Chicago-L&N-SCL. It was concluded by Witness Brennan that this traffic will be vulnerable to loss after merger and will be routed Nuco-Birmingham-SCL for the following reasons:

A. Nuco serves point of origin.

B. Superior service from origin to junction point.

C. Improved car supply.

These shipments of ITOFCA TOFC traffic are almost designed for the synergism of the merged BN/SLSF. Nuco will include the acquisition of the motor carrier subsidiaries of both the BN and Frisco (Tr. 602 thru 605). The flexibility of improved equipment supply, single-line service to the Birmingham gateway make these shipments a sure target for a merged BN/SLSF. Since these are TOFC shipments which move from a ramp, the reference to "switching industry at origin" (line 14, Tr. 5105) is not an issue, and is another example wherein applicants' counsel engaged in rather obtuse suggestion than deal squarely with the real facts of Witness Brennan's studies. Of great importance in support of Witness Brennan's diversion of this business is the volume of shipments the BN already does with this firm, ITOFCA, because of equipment supply and superior service.

Milwaukee Road F.I.F. page No. 3202 (Tr. 5112) involves a movement of Freight Trailers from Oklahoma City, OK to Elk Point, SD in Plan III, TOFC service and was routed CRIP-Kansas City-Milwaukee. Witness Brennan judged this traffic to be divertible and subject to a complete loss to the Milwaukee in that shipment will be routed via Nuco direct after merger for the following reasons:

1. Origin and destination served by Nuco.

5. Superior service via Nuco in single-line haul.

7. Improved car supply.

Witness Brennan's judgment that this sample will be lost to Nuco is sound because it is obvious the shipper and receiver will take advantage of single-line service. This TOFC shipment was deramped at Sioux City and records available have not shown limitations of any kind in connection with the BN ramp at Sioux City.

Milwaukee Road F.I.F. page No. 3970, Tr. 5144, covers a shipment of Steel Box Straps from Argo, IL to Houston, TX which was routed IHB-Franklin Park-Milwaukee Road-Kansas City-MKT. Witness Brennan considered this traffic to be divertible and will be routed IHB-Nuco after merger for the following reasons:

1. Nuco serves destination station.

5. Superior service via Nuco single-line.

7. Improved car supply.

11. Nuco equipment used.

Applicants' counsel asked on line 1, Tr. 5116, "today and the Rock Island could, the Missouri Pacific could?" in discussing Milwaukee reference to single-line service in Witness Brennan's criteria. The fact that there are carriers <u>today</u> that can perform single-line service between Argo, IL (with the IHB) and Houston, TX does not lessen the probability of loss by the Milwaukee Road. Rather, the vulnerability of the Milwaukee Road to loss will be <u>increased</u> by the addition of another single-line carrier in this corridor.

Milwaukee Road F.I.F. page No. 4135 Tr. 5160 covers a movement of Popcorn Confectionery from Chicago, IL to Morrow, GA which was routed BRC-MILW-SOU. Witness Brennan judged this shipment divertible and subject to loss by Milwaukee in that shipment will be routed BRC-Nuco-SOU via Birmingham gateway because:

A. Origin served by Nuco.

B. Superior service via Nuco via Birmingham gateway.

C. Improved car supply.

Applicants' counsel, (line 10 Tr. 5161) referred to the fact that this shipment moved in a Southern Railroad car and goes on to imply that the Southern car would preserve the move for the Milwaukee. However, the waybill contains the following: "Unassigned Car CSD 150A when empty handle per owner instructions or return empty or loaded to owner". This is a controllable box car, unassigned and it can be replaced by a BN/Frisco merged lines car or as noted on waybill the Southern car can be routed BRC-Nuco-Birmingham-SOU. It is obvious this shipment fits the objectives of the BN/SLSF merger synergism.

Milwaukee Road F.I.F. page No. 1953 (Tr. 5162) covers a movement of Pipe from Republic Steel, Chicago, IL to Republic Supply Co., Oklahoma City, OK via IHB-MILW-ATSF. Witness Brennan judged this shipment vulnerable to diversion and subject to loss to Milwaukee Road with route of IHB-Nuco direct to destination because:

A. Origin and destination served by Nuco.

B. Superior service via Nuco single-line direct.

C. Improved car supply.

Applicants' counsel (lines 6, 7, 8 and 9, Tr. 5163) refers to origin agency comment "No. Assigned equipment assured our line-haul over Kansas City". However, the origin agency representative did not have the benefit of the underlying papers, waybill and abstract, which would show there are no instructions on the waybill about assignment or return. The vulnerability of this shipment to merged BN/SLSF lines overwhelming strength is obvious. That there are already lines offering single-line service between Chicago and Oklahoma City does not lessen the plight of Milwaukee Road; rather, an additional single-line carrier in this corridor multiplies Milwaukee Road's problems. A suitable car of BN/Frisco ownership will replace Milwaukee Road.

Milwaukee Road F.I.F. page 4049 and 4345 (Tr. 5164). FIF 4049 covers a shipment of Printing Paper from Champion International, Houston, TX on the Port Terminal Railroad Association (switch line) to Reida Cartage, Morton Grove, IL on the Milwaukee Road. FIF 4345 covers a shipment of Bag Cement from Trinity Portland, Houston, TX on the SP and MP to Sandstrom Products Co., Port Byron, IL on the Milwaukee. Witness Brennan judged these shipments vulnerable to diversion and subject to short-haul loss to the Milwaukee because:

A. Origin served by Nuco.

B. Superior service via Nuco.

C. Improved car supply.

On lines 11 through 17 Tr. 5166 F.I.F. 4049, applicants' counsel referred to the shipment moving via MKT in a MKT car. There is no notable influence about these two factors. The waybill is noted "unassigned car CSD No. 150". The shipper is served by the Port Terminal Railroad Assn., a switch line equally assessable to all Houston lines including the merged BN/SLSF via Nuco subsidiary FWD.

On lines 19 Tr. 5166 thru 10 Tr. 5167, applicants' counsel referred to the shipment moving via ATSF in an ATSF car. There is no notable influence about these two factors. There is no assignment comment in the waybill nor car billing instructions. The shipper is served by the SP and MP who will be as equally assessable to Nuco subsidiary FWD as the ATSF.

The two shipments are very good examples of fitting exactly into the stated objectives of the BN/SLSF lines merger. They look straight into the strength of the merged BN/SLSF lines and are especially vulnerable to Nuco.

Milwaukee Road F.I.F. page No. 4276 (Tr. 5154) and F.I.F. 4321 (Tr. 5154) involve sample movements of Fullers Earth from Attapulgus, GA to Muscatine, IA which were routed SCL-Montgomery-L&N-Birmingham-SLSF Kansas City-MILW. Witness Brennan judged the traffic divertible via SCL-Birmingham-Nuco-Ottumwa-MILW because:

5. Superior service via Nuco.

6. Nuco presently participates in route.

8. Improved utilization of private equipment.

Applicants' counsel on lines 15, Tr. 5155 through line 14, Tr. 5156, outlined the factors involved with train operations that would be BN/SLSF internal information and indicates the Ottumwa gateway may not be the effective service route on this traffic. The fact is, however, the SLSF was in the route in 1976, short-hauling the Family Lines System, the origin carrier. With the overwhelming power of the merged BN/SLSF lines in sales coverage they will be able to influence customer controlled private equipment, in which these shipments moved, and handle the cars via the more expeditious route they prefer to handle to destination. Witness Brennan believes Nuco will have a strong voice in the handling

of future movements. If it is to Nuco's benefit to use other gateways, such as East Moline, to sell the Nuco services in this movement they will have the strength and influence to effectively accomplish this and short-haul Milwaukee Road. Circumstances, facts and objectivity strongly suggest Milwaukee Road's extreme vulnerability to short-haul diversion of this traffic and Nuco synergism.

The efforts made by applicants' counsel to divert attention from witness Brennan's judgment considerations do not affect the value of those diversion judgments on this record. The Commission should not be misled; those judgments are objective, reasonable, and sound.

(4) Applicants' Rebuttal of the Milwaukee Road Study is a Congeries of Distortion.

Applicants' rebuttal of the Milwaukee Road traffic study was contained in their Witness Round's Ex. H-171, pp. 57-91, plus his Appendices M-1 through M-22. The following exposition of his testimony adequately reveals that this rebuttal is wholly comprised of misstatement and distortion.

For the first example, we have Witness Round's Ex. H-171 Rebuttal Paragraph A, Page 63, Appendix M-1, Exhibit H-114, "Losses outside sampling period". Here, Mr. Round intended to discredit Milwaukee Road's sample; but these aberrations were explained and defined by Witness Meier, (Tr. 4882). These shipments were waybilled 1975, 6 of which were waybilled in December. MILW Traffic Data Base (TDB) is a record of business reported for the year 1976. If selective deletions were to be made because the movement occurred in previous calendar year, the record would be unbalanced by that many movements. A number of 1976 movements are no doubt in MILW 1977 TDB tapes. The presence of a few 1975 movements in the 1976 study is wholly normal and does not detract from the validity of the study. The following table exemplifies:

FIF Page No.	Origin	Destination	Waybill Date	Revenue-Page Settled Date
261	Columbia Jct, WA	Baton Rouge, LA	12-20-75	1-76
262	Quesnel, BC	Doraville, GA	12-11-75	1-76
433	Quesnel, BC	Douglas, GA	12-10-75	12-75
615	Taylor, BC	Columbus, GA	12-17-75	1-76
2323	Fort Nelson, BC	Atlanta, GA	10-24-75	11-75
2325	Houston, BC	N. Wilkesboro, NC	10-18-75	10-75
2606	Houston, BC	Waynesville, NC	12-10-75	1-76
2870	Yarto, SK	Rochelle, GA	12-22-75	1-76
3441	Ashdown, AR	Kearney, NJ	11-19-75	12-75
3968	Smithers, BC	Covington, GA	8-29-75	9-75

These are all overhead cars to destinations in the Southeast, and appear as duplicates in other Round Appendices as shown below:

FIF Page No.	Is Duplicated in Round Appendix	$ Overstated
261	M-3	12,610
262	M-19	19,170
433	M-19	18,260
615	M-19	14,580
2323	M-19	36,320
2325	M-20	17,600
2606	M-20	19,240
2870	M-2 (also M-20)	32,120
3968	M-20	18,120
		180,020

Rather than an overstatement in Milwaukee Road's Study, therefore, these duplications reflect an error of overstatement in Witness Round's appendices of $180,020.

Witness Round's Appendix M-1 shows the MILW Field Information Form Page Number, ("Page") "Strata," and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units, the expansion factors for which are explained in Appendix C of Witness Meier's Exhibit H-111. For information and ready reference, Appendix B in Volume II attached shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route the shipments traversed and the projected new route upon merger.

Witness Round's Ex. H-171, Rebuttal Paragraph B, Page 64, Appendix M-2 "Unresolved inconsistencies between field and headquarters evaluations" refers to 132 examples deemed not divertible by field evaluators changed to divertible by Witness Brennan, but he did not count the 1734 examples deemed divertible by the field evaluators and changed to non-divertible by Witness Brennan, (Tr. 6763-6766). The 1734

MILW count is not an expanded figure (Tr. 6765, 6864) just as the 132 count by Witness Round is not an expanded figure. Important ingredients for Witness Brennan's judgments are the criteria appearing on the Field Information Forms along with underlying support papers, waybills and abstracts, which were furnished to the BN-Frisco Discovery Team that visited MILW offices (Tr. 6762-3).

Witness Round's appendices to his Rebuttal Statement Ex. H-171 contain many duplications. The table below shows where they exist and the amount of revenues overstated:

VULNERABLE

FIF Page No.	Is Duplicated In Appendix	$ Overstated
44	M-16	12,610
223	M-16	15,420
266	M-3	14,540
304	M-3	22,680
431	M-3	13,620
495	M-9	16,960
529	M-3	13,050
676	M-3	11,290
702	M-3	15,890
858	M-3	22,120
886	M-3	18,190
892	M-3	22,060
1906	M-6	18,720
1973	M-12	18,400
2048	M-20	36,480
2256	M-4	17,120
2273	M-13	7,360
2298	M-4	17,120
2299	M-13	7,480
2488	M-12	15,880
2571	M-12	14,000
2712	M-15	5,720
2774	M-4	19,400
2803	M-13	7,160
2863	M-12	12,800
2870	M-1 (also M-20)	32,120
2882	M-20	28,120
2888	M-20	35,680
2897	M-6	19,960
2924	M-6	16,280
3019	M-13	6,800
3021	M-12	16,240

VULNERABLE

FIF Page No.	Is Duplicated In Appendix	$ Overstated
3077	M-12	14,960
3139	M-20	34,120
3297	M-12	13,040
3337	M-12	13,600
3389	M-12	7,520
3400	M-12	12,920
3429	M-20	33,320
3432	M-20	11,240
3633	M-12	25,040
3847	M-4	15,280
4169	M-12	7,800
4256	M-12	14,840
4298	M-15	7,640
4517	M-20	33,680
4521	M-20	32,480
		828,750

DIVERTIBLE

FIF Page No.	Is Duplicated In Appendix	$ Overstated
140	M-9	10,080
257	M-3	14,900
406	M-3	16,900
427	M-9	16,960
832	M-3	15,510
1937	M-4	20,840
1975	M-4	17,960
2008	M-12	14,160
2200	M-12	16,640
2206	M-12	7,080
2207	M-4	20,840
2563	M-4	20,840
2588	M-12	8,760
3870	M-13	16,280
3941	M-4	18,000
3942	M-13	11,000
4492	M-4	20,960
		267,710

These duplications reflect an overstated error in Witness Round's appendices of $1,096,460. FIF Page 953 is another overstated error in Witness Round's appendices of $29,760 because this sample is a "NO CHANGE" judgment of Witness Brennan. FIF Page 2681 is shown twice, under both Vulnerable and Divertible, within this exhibit resulting in an additional overstatement of $17,880. The total overstatement for Appendix M-2 comes to $1,144,100.

Witness Round, Ex. H-171, page 64 testified:

> "We have made no attempt to analyze these movements to determine whether, in our view, the overruling of the field judgments are reasonable. But neither do the work sheets give us a basis for evaluating the reversals since Mr. Brennan's group made no notations or explanations on these sheets".

The following criteria were made available to the BN-FRISCO representatives who visited MILW Road offices for discovery purposes:

The Divertible criteria were:

1. Origin and/or destination served by Merged BN/F.
2. Merged BN/F physically switches industry at origin.
3. Merged BN/F physically switches industry at destination.
4. Merged BN/F physically switches industry at both origin and destination.
5. Superior service by Merged BN/F.
6. Merged BN/F presently participates in route.
7. Improved car supply.
8. Improved utilization of private equipment.
9. Elimination of accessorial charge (Switching at intermediate point).
10. Similar movement in Merged BN/F study.
11. Merged BN/F equipment used.

The Vulnerable criteria were:

A. Origin and/or destination served by Merged BN/F
B. Superior service via Merged BN/F.
C. Improved car supply.
D. Similar movement in Merged BN/F study.
E. Improved utilization of private equipment.
F. Merged BN/F presently participates in route
G. Merged BN/F equipment used.

It will be noted from the above that the vulnerable criteria of "A" is the same as Number 1 under Divertible; "B" is the same as Number 5; "C" is the same as Number 7; "D" is the same as Number 10; "E" is the same as Number 8; "F" is the same as Number 6; and "G" is the same as Number 11. All of the Field Information Forms of the MILW had the above "codation" (Tr. 4940, line 2) on them and spelled out the factors used by Witness Brennan to make final evaluations as to whether or not the particular sample movement was considered divertible or vulnerable. Witness Round's criticism is without foundation.

On Page 64 of Ex. H-171 Mr. Round first used the count "133 instances" in building Paragraph B, Appendix M-2; and at Tr. pages 6764 and 6842, he corrected and reduced the number to 132. The above chart shows the number needs to be further corrected and reduced to 130 because in the vulnerable category FIF 953 is shown incorrectly. Actually, MILW work papers show this as "No change-taken as non-involved" instead of "vulnerable," which the BN study team should have known. In "vulnerable" category, FIF 268 is duplicated by also being shown in the "divertible" category. These two additional corrections therefore changes the count to 130. Appendix "C" attached in Volume II expands on Witness Round's Appendix M-2 by showing origin, shipper, destination and the divertible and vulnerable criteria shown on MILW Field Information Forms, which were studied by applicants' discovery team.

Witness Round in Ex. H-171, page 65, Paragraph C, "WEYERHAEUSER TRAFFIC," and Appendix M-3 thereto, is critical of Milwaukee Road taking losses on 64 sample movements involving Weyerhaeuser. These 64 samples expand to a total of 740 carloads. These losses are obviously very realistic and conservative considering the overwhelming benefits of the BN-FRISCO merger and their projected synergistic gains, improved service and equipment supply, between the Pacific Northwest and the Southeast. During 1976 Milwaukee Road handled a total of 45,414 carloads for Weyerhaeuser and here projected losses of 740 carloads, representing only 1.6% of the business handled for this firm. Its traffic study indicates that it expects 270 of these carloads to be diverted to Nuco upon merger and 470 carloads deemed vulnerable and expected to be lost after year two and beyond following merger.

At Everett, WA the Weyerhaueser Lumber Mill favored BN in 1976 with 1,627 carloads or 57.54% of total and favored the Milwaukee Road with 1,236 carloads or 42.46%. At the Pulp Mill, Witness Round advises

that despite a strict allocation policy they were successful in getting next to the local people (Ex. H-171, Page 66) and were favored in 1976 with 539 carloads, 91.98% while the Milwaukee Road received only 47 carloads, 8.02%. Witness Round on page 66 of Ex. H-171 advises: "At the end of that year Tacoma, the headquarters for Weyerhaueser, intervened and put a damper on the local tendency to favor BN. As a result in 1977 BN obtained 539 cars while Milwaukee Road acquired 322." So, despite a "strict 50/50 allocation policy" and intervention of headquarters BN still handled 62.6% while the Milwaukee Road handled 34.4% of the total.

Of the 20 sample movements, the Frisco was involved in the original route on 7 movements (Ex. H-171, Appendix M. Page 3). Upon merger, Nuco will be able to handle 9 of these sample movements single-line from origin to destination, five sample movements long-haul to connections at Birmingham gateway and six sample movements long-haul to connections at Memphis gateway. Milwaukee Road's 20 sample movements expand to 210 carloads, 100 of which are expected to be diverted upon merger and 110 deemed vulnerable and are expected to be lost after year two and beyond following merger.

At Snoqualmie Falls, WA, of the 13 sample movements, the Frisco was involved in the original route on 5 sample movements. Upon merger, Nuco will be able to handle 9 of these sample movements single-line from origin to destination, 2 sample movements long-haul to connection via Memphis gateway, 1 long-haul via Birmingham gateway and 1 long-haul via Sherman gateway. The 13 sample movements indicate that 10 samples involved flatcar equipment. Witness Round, page 67, Ex. H-171, indicated inability or unwillingness of BN to furnish flatcar equipment, indicating BN handled only 35% of Weyerhaueser business from this plant. In Tr. 6804, Witness Round indicated that this 35% was for the year 1978 not

the year of study which was 1976. Milwaukee Road records indicate the BN handled 58% and Milwaukee Road 42% of this plant's business during 1976. The 13 sample movements expand to 190 carloads 90 of which MILW expects will be diverted upon merger, and 100 of which MILW deems vulnerable and which are expected to be lost in year two and beyond following merger.

At Raymond, WA, of the 4 sample movements, the Frisco was involved in the original route on 2 sample movements. Upon merger, Nuco will be able to handle 3 sample movements single-line and 1 movement to connection via their long-haul Birmingham gateway. The 4 sample movements expand to 50 carloads, 30 of which MILW expects to be diverted upon merger and 20 of which are deemed vulnerable and expected to be lost in year two and beyond following merger.

At Columbia Junction, WA, of the 18 sample movements, the Frisco was involved in the original route on 4 sample movements. Upon merger Nuco will be able to handle 7 sample movements single-line from their connection with the Columbia and Cowlitz RR. (CLC) to destination, six via their long-haul to their connections at Memphis gateway and 5 long-haul to connections at Birmingham gateway. Witness Round, Ex. H-171, Page 68 states:

> "It is obvious in this case that Weyerhaueser has attempted to help Milwaukee Road meet its allocation quotas by providing CLC equipment."

Witness Round when asked by counsel how many of the CLC cars were handled by the BN during this same period advised he did not know (Tr. 6803 - lines 16-21). It is certainly far from obvious that the CLC cars handled by Milwaukee Road were an attempt by Weyerhaeuser to help Milwaukee Road meet its allocation quotas anymore than the handling of CLC cars by the BN and UP were attempts by Weyerhaeuser to help them meet <u>their</u>

allocation quotas. There is nothing of record to show such benevolence. It is mere surmise.

The Official Railway Equipment Register for 1976 indicates that the Columbia and Cowlitz owned 80 pieces of equipment, flat cars and box cars, carrying CLC marks. The Milwaukee Road study shows six CLC cars involved in the sample. These six samples expand to 80 carloads. Assuming a monthly turnaround on the CLC equipment, this equipment should have handled a total of 960 shipments in 1976. This further indicates that the BN and UP handled a total of 880 shipments from this plant in CLC equipment during 1976. In other words, Weyerhaeuser "helped" Milwaukee Road to the extent of 8.3% while "helping" the BN and UP combined to the extent of 91.7%. The 18 sample movements expand to 200 carloads, 40 of which are expected to be diverted upon merger and 160 which are deemed vulnerable and expected to be lost in year two and beyond.

At Aberdeen and Cosmopolis, WA, of the 9 sample moves, the Frisco was involved in the original route on one movement. Upon merger Nuco will be able to handle one sample movement single-line from origin to destination and 8 sample movements long-haul to connections at Memphis gateway. The 9 sample movements expand to 90 carloads, 10 of which are expected to be diverted from Milwaukee Road upon merger and 80 which are deemed vulnerable to diversion in year two and beyond following merger.

Witness Round's Appendix M-3 shows the MILW Field Information Form Page Number ("Page") "Strata", and "Expanded Losses" <u>in Dollars</u> for Divertible and Vulnerable shipments. Conveniently, he did <u>not</u> expand the Units, the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix D attached in Volume II is submitted showing the expansion

factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-174 for identification by Judge Clerman but subsequently rejected, Tr. 7124. Exception to that ruling pursuant to Rule 85 is here preserved.

Additionally, as Appendix DD, attached, the MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

The following list shows are duplications found in Witness Round's Rebuttal affecting Appendix M-3 of Exhibit H-171 and its page 69:

FIF Page No.	Is Duplicated in Appendix	$ OVERSTATED
257	M-2	14,900
406	M-2	16,900
832	M-2	15,510
304	M-2	22,680
676	M-2	11,290
858	M-2	22,120
266	M-2	14,540
431	M-2	13,620
529	M-2	13,050
702	M-2	15,890
886	M-2	18,190
892	M-2	22,060
		200,750

These duplications reflect other errors of overstatement in Witness Round's Appendix M-3 in the amount of $200,750.

Witness Round's Ex. H-171 Paragraph D, Page 69, Appendix M-4, expanded the Quaker Oats revenue but not the cars. The 16 sample diversions expand to 640 cars. In 1976, Quaker Oats shipped approximately 4,680 cars of which MILW handled 1,908 cars or 40.76%. MILW projected loss of

33.5%, represented by 640 car samples, is very realistic and conservative when considered against the overwhelming benefits of the BN/Frisco Merger previously mentioned herein, e.g., single-line, improved and faster service, and improved car supply into the heart of the territory of the proposed merger. Page 69 of Ex. H-171 stated that the Rockford plant of Quaker Oats is served by three lines, MILW, ICG and BN. In fact, the C&NW also is a Quaker Oats carrier at Rockford, (Tr. 6808). Tr. 6809 indicates an attempt to prove that the track is actually owned by the BN, and other Rockford carriers use it under a track agreement; but Witness Round admitted that the present arrangement is subject to possible modification and/or elimination by the BN (Tr. 6808).

The following table shows duplication of F.I.F. Pages in Witness Round's Appendix M-4:

F.I.F. Page No.	Is Duplicated in Appendix	$ Overstatement
1937	M-2	20,840
1975	M-2	17,960
2207	M-2	20,840
2563	M-2	20,840
3941	M-2	18,000
4492	M-2	20,960
2256	M-2	17,120
2298	M-2	17,120
2774	M-2	19,400
3847	M-2	15,280
		188,360

These duplications reflect another error of overstatement in Witness Round's Appendices of $188,360.

Witness Round's Appendix M-4 shows the MILW Field Information Form Page Number, ("Page") "Strata", and "Expanded Losses" in dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units, the expansion factors for which are explained in

Appendix C of Witness Meier's Exhibit H-111. For information and ready reference, Appendix E attached in Volume II is submitted showing the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route the shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-175 for identification by Judge Clerman but subsequently rejected, Tr. 7124, to which ruling exception is here preserved.

Additionally, as Appendix EE attached, the MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171 page 70, Paragraph E - Other shippers practicing allocations, and Appendix M-5 thereto, covers anticipated traffic losses originating Green Bay, WI, with the build-up of the BN/GBW Winona gateway interchange of cars MILW anticipates through the intensified joint effort as the result of improved car supply the BN can make available to the GBW, along with improved service to the Southeast, for example Memphis, TN, and the Southwest, Dallas and Fort Worth, TX. That MILW's anticipation is reasonable is shown by the history of BN/GBW car supply practice, found by the Commission in F.D. 27770, Burlington Northern - Control -Green Bay & Western, Decision served July 15, 1977, page 21.

The following movements from applicants' study showed diversion taken from C&NW at Green Bay via GB&W-Winona-Nuco:

SMS 7791	Green Bay,	WI	to	Fulco, GA (Tr. 1340)
SMS 7792	"	"	"	Fulco, GA (Tr. 1345)
SMS 7796	"	"	"	Bolivar, MO (Tr. 1343)

If applicants concede that they shall be able to divert this C&NW business following merger, their ability to divert MILW Green Bay business should follow. Applicants offered no reason for any distinction.

Witness Round's error in the three shipments from St. Regis, Cantonment, FL is acknowledged in his testimony, (Tr. 6812, 6814), on the two shipments to Grief Bros., Rosemont, MN routed SLSF-Kansas City, MO-MILW, and one car to Bemis Bag (served by BN) Minneapolis, MN routed L&N-MILW. The allocation case Witness Round attempts to build would apply to the originating carriers L&N, SLSF and not to the MILW (Tr. 6814, lines 7, 8 and 9). Similarly, Witness Knuth acknowledged the diversion Cantonment, FL to Knowles, WI (Tr. 1097).

Witness Round's Appendix M-5 shows the MILW Field Information Form Page Number, ("Page"), "Strata" and "Expanded Losses" in dollars for Divertible and Vulnerable shipments.
Conveniently, he did not expand the Units, the expansion factors for which are explained in Appendix C, to Witness Meier's Exhibit H-111. For information and ready reference, Appendix F attached in Volume II, shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route the shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-176 for identification by Judge Clerman but subsequently rejected, Tr. 7124, to which ruling exception is preserved herewith.

Additionally, as Appendix FF attached, MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171 Rebuttal Paragraph F - "NEKOOSA EDWARDS AT ASHDOWN, ARKANSAS," Page 71, and Appendix M-6, deals with traffic originating at Ashdown, AR. When the BN-SLSF merger is accomplished, the BN becomes "the Ashdown carrier" succeeding Frisco with all the accompanying on-line, "down-home" benefits and advantages. The BN will be able to influence not only that traffic which the NUCO will originate at Ashdown, AR, but they will also be able to influence the handling of traffic beyond the Kansas City, MO gateway which originates on the KCS at Ashdown, AR. The BN becomes the "hometown folks" assisting the shippers in making and quoting rates, freight claim assistance, furnishing and tracing of equipment, both NUCO and foreign cars. The foregoing benefits that shippers can expect are very much merger related.

Again, there is duplication in the data shown in Witness Round's Appendices, e.g.:

FIF PAGE No.	Is duplicated in Appendix	$ Overstatement
1906	M-2	18,720
2897	M-2	19,960
2924	M-2	16,280

These duplications reflect additional errors of overstatement in Witness Round's Appendices of $54,960.

Witness Round's Appendix M-6 shows the MILW Field Information Form Page Number, "Strata" and "Expanded Loss" in dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix G attached in Volume II shows the expansion factor on each of the FIF

Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route the shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-177 for identification, but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix GG, attached, MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's H-171 Rebuttal Paragraph G - Ammonia Nitrate, Military, Kansas to Biwabik, Minnesota, Page 73, Appendix M-7. When the BN-SLSF merger is accomplished, the BN becomes the largest Military, KS carrier. The BN will be able to influence not only the traffic the BN will originate, but will also be in a stronger position to assist the shippers by the making and quoting of rates, tracing cars, follow claims, assist in locating and furnishing equipment, both NUCO and foreign line. NUCO will serve the shipper at Military, KS and have a long single-line route to their connection with the DM&IR which serves Biwabik, MN. Therefore, its single-line service will provide superior turn-around time on private equipment which the Milwaukee Road and connection will not be able to match.

Witness Round's Appendix M-7 shows the Milwaukee Field Information Form Page Number, "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix G attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent

detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-177 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix GG, attached, the MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's H-171 Rebuttal Paragraph H - Pulpboard, Schilling, Montana to Wichita, Kansas, and Appendix M-8, pertains to a movement of pulpboard from the Hoerner Waldorf plant at Schilling, Montana to Wichita, Kansas. Witness Round criticizes MILW showing as divertible shipments five sample moves representing 100 cars from a jointly MILW-BN served facility of the shipper to a SLSF-served destination, Wichita, KS. On page 74 of H-171, Witness Round refers to "a strict allocation policy", but at Tr. 6819-6822 Witness Round outlines how a "strict allocation policy" breaks down under day-to-day operations of available equipment, single-line service, etc. Also on page 74 of Ex. H-171 Witness opines "We expect that if the merged company should capture this traffic, MILW would be compensated with other movements, which would maintain the plant's allocation policy". This is purely speculation by Witness Round. On Tr. 6821, he acknowledged this speculation: QUESTION "Then, again, in the paragraph immediately following, how do you know that the Milwaukee Road would be compensated with other movements from this shipper; how do you know that? Line 15, ANSWER "I don't know that. I suspect that it would happen, but I don't know that."

Witness Round's Appendix M-8 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix H attached in Volume II shows the expansion factor on each of the FIF pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-178 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix HH, attached, MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's H-171 Paragraph I - Woodpulp from Scott Paper at Everett, Washington, page 74, and Appendix M-9, covers 5 shipments (expands to 50 cars) from Scott Paper Co., Everett, WA, served by the BN, into the heart of the FRISCO served part of the country and responds to the reality of the "synergistic effect" of the merger. These expanded 50 cars represent 2.25% of the 2,218 cars shipped from Everett, WA in 1976 and 7.0% of the 713 cars the MILW handled in 1976, a very conservative diversion when measured against the overwhelming strength of the objective of the merged BN/FRISCO systems. There are also duplications in Appendix M-9:

FIF PAGE NO.	Is duplicated in Appendix	$ Overstated
140	M-2	10,080
427	M-2	16,960
495	M-2	16,960
		44,000

These duplications reflect further errors of overstatement in Witness Round's Appendices of $44,000.

These are similar examples in NUCO traffic study of diversion taken:

SMS 2175 - MILW car 40222 Coeur d'Alene, ID to Doraville, GA
SMS 7805 - MILW car 52157 Marinette, WI to Springfield, MO

In SMS 2175, the NUCO evaluation says "equipment furnished and allocation of traffic not major factors".

Witness Round's Appendix M-9 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Loss" in dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units, the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix H attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-178 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix HH, attached, MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171 page 75, Paragraph J - Traffic originated at ITT Rayonier Plants at Hoquiam and Tacoma, Washington, and Appendix M-10 refers to shipments originating in Hoquiam and Tacoma, WA and destined to Kingsport, TN (jointly served by SOU-Clinchfield) and Greeneville, TN (served by SOU). These shipments clearly respond to the purpose of the BN/FRISCO merger and fit the objective like a glove of improved car supply and improved single-line service between the Pacific Northwest and Memphis, TN gateway and connection with the East-West line of the Southern. That the divertibility of these shipments conforms to views of BN/FRISCO evaluation is shown in applicants' SMS 7761 covering UP car 170325 from ITT Rayonier to Kingsport, TN diverted from UP-FRISCO-SOU to Nuco-Memphis-SOU. If the BN/FRISCO believe they can divert this business from the UP (a very strong railroad serving the Northwest) it is obvious they can very effectively implement their synergistic concept with this movement to the detriment of MILW. This one car they feel they can divert from the UP represents 100 carloads under Applicant's 1% sampling. Further and of more importance is the fact that Witness Knuth on SMS 7761 states that "equipment used is not a factor".

Witness Round's Appendix M-10 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix I attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-179 for identification but subsequently rejected,

Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix II, the MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, Paragraph K, Logs from Longview Fibre at Longview, Washington, covers a shipment of paper from Longview, WA to Doraville, GA which fits right into the objectives of the BN/FRISCO merger for routing between the Pacific Northwest and the Southeast and single-line service to the Birmingham gateway thence connection for the East-West line of the Southern. With BN/FRISCO improved car supply and better single-line service to the Birmingham gateway, this shipment conforms ideally to the anticipated BN/FRISCO merger benefits and its synergism. Witness Round's testimony on Tr. 6827 to the point that if Nuco is successful in getting this business, the Milwaukee Road will be favored elsewhere is purely speculation with no basis of fact at all and his premise should be rejected. This example expands to 10 carloads.

Witness Round's Ex. H-171, page 77, Paragraph L - Aluminum ingots from Reynolds Metal at Longview, Washington, and his Appendix M-11 has to to with shipments from Reynolds Metals Co., Longview, WA, served by the Longview Switching Company jointly owned by MILW-BN-UP to Reynolds Metals Co., Listerhill, AL served by the SOU. Such shipments fit very well into the objective of the BN/FRISCO merger which will provide improved car supply and improved service from the Pacific Northwest to the Memphis gateway. This is discussed in Mr. Round's testimony Tr. 6829. It is just a short run on the SOU East-West line to Listerhill, AL (See The Official Railway Guide, Jan/Feb 1979, page 416). These shipments

also fit very effectively into the merger benefits of the BN/FRISCO and their synergestic efforts to become an even stronger and bigger railroad serving most of the United States. These are examples of shipments of a similar nature which the BN/FRISCO evaluator took as divertible:

SMS 7761 UP 170825 Aberdeen, WA to Kingsport, TN
SMS 2175 MILW 40242 Coeur d' Alene, ID to Doraville, GA

Witness Round's Appendix M-11 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Loss" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix J attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-180 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix JJ, attached, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 78, Paragraph M - John Deere and International Harvester shipments from Dubuque, Iowa; East Moline, Moline, Rock Island, and Norpaul, Illinois and Appendix M-12 has to do with shipments of John Deere and International Harvester companies from Dubuque, IA, East Moline, IL, Moline, IL, Rock Island, IL and Norpaul, IL all of which moved to destinations in the Southwest and destinations in the Southeast. This area will be where much of the

strength of the merged BN/FRISCO will be concentrated. These diversions conform and meet the objectives of the BN/FRISCO merger such as single-line and faster service. There is a similar shipment in the BN/FRISCO traffic study which Witness Knuth took as a diversion and for that reason MILW believes that the NUCO will be able to divert traffic from its line resulting in additional loss of revenue. For reference, SMS 2236 covers MILW car 61026 from East Moline, IL to LePanto, AR which Witness Knuth took as a diversion. No rational distinction can be drawn; MILW concedes the accuracy of the SMS 2236 judgment.

In addition, there also are duplications in Mr. Round's Appendix M-12 as shown below which overstates his figures:

FIF PAGE NO.	Is duplicated in Appendix	$ Overstated
2008	M-2	14,160
2588	M-2	8,760
2200	M-2	16,640
2206	M-2	7,080
1973	M-2	18,400
2488	M-2	15,880
2571	M-2	14,000
3077	M-2	14,960
3297	M-2	13,040
3389	M-2	7,520
3400	M-2	12,920
		233,680

These duplications reflect more errors in overstated amounts in Witness Round's Appendices of $233,680.

Witness Round's Appendix M-12 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Loss" in dollarsI for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix K attached in Volume II shows the expansion factor on each of

the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-181 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix KK, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 80, Paragraph N - Freight All Kinds from Davenport, Iowa and Appendix M-13 has to do with shipments of Freight All Kinds (FAK) from Davenport, IA. The BN does not have a ramp at Davenport, IA, but they elect to have a TOFC ramp at Galesburg, which is only 41 miles from Rock Island (Quad Cities) (Tr. 6831-2). The BN has Plan II½ rates from Galesburg to the Southwest, example Dallas, TX in SWL Freight Tariff 7077 (old #77) I.C.C. No. 7077. The FRISCO concurs and participates in these Plan II½ rates to the Southwest. The FRISCO also participates in Plan II½ rates to the Southeast, examples being Doraville, GA and St. Petersburg, FL in SFA Freight Tariff 7110 (old #1110), I.C.C. No. 7110 from Davenport, IA. This fact plus equipment supply with improved service by the merged company to the southwest and southeast make these shipments vulnerable to merged BN/FRISCO system benefits as previously mentioned herein. Again, there are duplication of FIF Page numbers in Witness Round's Appendix M-13:

FIF PAGE No.	Is duplicated in Appendix	$ Overstated
3870	M-2	16,280
3942	M-2	11,000
2273	M-2	7,360
2299	M-2	7,480
2803	M-2	7,160
3019	M-2	6,800
		56,080

These duplications continue to reflect Witness Round's errors in overstating the amounts shown in his Appendices, in this case $56,080.

Witness Round's Appendix M-13 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units, the expansion factors for which are explained in Appendix C, to Witness Meier's Exhibit H-111. For information and ready reference, Appendix L attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-182 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix LL, the MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171 page 81, Paragraph O - North Star Steel St. Paul, Minnesota and Appendix M-14 deals with Milwaukee Road losses on 15 TOFC and 7 carload shipments of steel from North Star Steel Co., St. Paul, MN to Oklahoma, Texas and the Southeast. Witness Round

Page 81 testifies "Neither the BN nor FRISCO participate in these rates because of their low revenue production". On Tr. 6833, Witness Round further says "We do not participate under the current level of rates, and the BN, as I recall, never has". The FRISCO which will become a part of NUCO became a party to the Twin Cities (St. Paul) to Tulsa rates in Item 14578, Supplement 10, SWL 77-H, effective February 15, 1976 and were carried forward in Item 14578-A, Supplement 31, SWL 77-H. These shipments must be judged on basis of conditions as they were in 1976. In 1976, the FRISCO was a party to the rates and Tr. 6833, Witness Round says "We are saying that we will not arbitrarily cancel the rates simply because there is a merger" (Emphasis added). It is apparent that there is a strong probability that applicants will divert the business from the MILW now that they can obtain all of the freight charges for the movement and increase their revenue production.

Witness Round's Appendix M-14 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, to Witness Meier's Exhibit H-111. For information and ready reference, Appendix L attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-182 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix LL attached in Volume II, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in

evaluating each sample movement.

Witness Round's Ex. H-171, page 81, Paragraph P - High-wide loads, Tulsa, Oklahoma to Virginia, Minnesota, covers 4 samples of so-called high-wide loads Tulsa, OK on the FRISCO to Virginia, MN served by the BN. High-wide loads are those shipments on which the lading of the car exceeds the width of the car and/or extends above the car and rail which poses problems if overhead bridges, wires or other permanent fixtures of some kind preclude the routing of the shipment via segments of track over certain carriers. Tr. 6834-5 shows the inability of Witness Round to substantiate his judgment.

Milwaukee Road's initial study of these shipments did not turn up any clearance records and the copy of the waybill obtainable did not have reference to track clearances. Because these were overhead shipments, MILW does not have access to copies of waybills. One car, F.I.F. page 270, SLSF car 2109 was 7'0" wide at 19'2" high and at 18'11" high was 10'3" wide, and at 3'5" high bottom of shipment was 10'6" wide. However, at 18'11" high, the BN published clearance table is 9'8" wide. In just about all cases, railroads are able to clear shipments beyond published tables in Railway Line Clearances (National Railway Publication Co., New York) by requests through engineering departments. The years of experience of MILW Transportation Department people convince them the BN is equally high and wide between Kansas City, MO and Twin Cities, MN, where the shipment was delivered to the BN, and able to accommodate this 7" difference between the MILW width of 10'3" at 18'11" high and the BN width of 9'8" at 18'11". The BN has multiple choice of routes by which they can move high-wide cars between these terminals. Clearance clerks are human and take lines of least resistance. When they form a habit of success of inquiries with one carrier they will not send wires out to 2

or 3 or 4 carriers if experience has shown a carrier can and will handle a shipment. After merger, NUCO will influence the requests for clearances as the billing carrier. These types of shipments will move single line via merged BN/Frisco system.

Witness Round's Ex. H-171, page 82, Paragraph Q - Origins at Wahpeton, North Dakota, covers FIF pages 237 and 409 which are shipments of used steam boiler parts shipped from Wahpeton, ND to Houston, TX for export by Cosmos Shipping Co., care Delta SS Lines requiring FW&D delivery in Houston. FW&D is a BN subsidiary. Shipments were routed MILW-Kansas City, MO-FRISCO for FW&D delivery. While Wahpeton was a common BN and MILW station, the shipment consisted of used machinery subject to team track loading by either carrier, and after the BN/FRISCO merger, NUCO will have single line service and, delivering carrier, FWD, will have the advantage of arranging all inland transportation services. FWD being a part of NUCO, future shipments will move Nuco single line.

Witness Round's Ex. H-171, page 82, Paragraph R - Weyerhaueser shipments, and Appendix M-15, criticises diversions taken of Weyerhaeuser shipments originating in Oklahoma and Arkansas on the MP and KCS. There are several reasons why these anticipated diversions are justified. Mr. Knuth makes many references to the extremely good relations with the Weyerhaeuser traffic manager at Hot Springs, Arkansas, (Tr. 1090). There are also similar examples in the NUCO Traffic study:

SMS 5680 car KCS 124231 Valliant, OK to Austin, MN
SMS 5486 car SLSF 5765 Craig, OK to Mason City, IA

The following duplication reflect another error of overstatement in Witness Round's Appendices of $13,360:

FIF PAGE NO.	Is duplicated in Appendix	$ Overstated
2712	M-2	5,720
4298	M-2	7,640
		13,360

Witness Round's Appendix M-15 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, to Witness Meier's Exhibit H-111. For information and ready reference, Appendix M attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-183 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix MM attached, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 83, Paragraph S - Originations in the Coeur d'Alene, Idaho, Area, and Appendix M-16 has to do with carloads of lumber originating at Coeur d'Alene, Idaho and destined to the Southeast and Southwest. This traffic obviously falls very clearly into the objective of the purposes and objectives of the BN/FRISCO merger. All samples are to the Southeast, but two of which are to the Southwest from Coeur d'Alene and Huetter, ID. Applicants' study contains an example of taking diversion:

SMS 2175 car MILW 40242 Couer d'Alene, ID to Doraville, GA The evaluation by Witness Knuth on SMS 2175 comments "equipment furnished and allocation of traffic not major factor" and yet, as on page 84 of his H-171, Witness Round claims shippers will not cut the Milwaukee Road

out of such routings. Both witnesses have diametrically opposite views; MILW concurs in those of Witness Knuth. Again, Witness Round's Appendix has duplications:

FIF PAGE NO.	Is duplicated in Appendix	$ Overstated
44	M-2	12,610
223	M-2	15,420
		28,030

These duplications reflect more errors of overstatement in Witness Round's Appendices of $28,030.

Witness Round's Appendix M-16 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix M is submitted in Volume II showing the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-183 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix MM, MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 84, Paragraph T - Chrysler Autos from Valley Park, Missouri to Kent and Spokane and Appendix M-17 covers shipments of Chrysler products from the Valley Park, MO ramp locally served by the SLSF and closed to reciprocal switching. These

shipments were destined to ramps served by the MILW at Spokane, WA open to switching per Item 960, MILW Tariff 11606 (new No. 8003) ICC B-8530 and Kent, WA served by the MILW and open to switching per Item 1260, MILW Tariff 11606. These shipments must be studied and considered on the basis of 1976 per Order in these proceedings. After merger, the Valley Park, MO ramp will be served by the merged BN/Frisco, and as origin carrier they will have a very strong influence on schedules and equipment placed. These factors plus the objectives of the merger, improved single line service, improved car and equipment supply, will influence these shipments to merged BN/Frisco single line service. It is interesting to note that BN/Frisco Witness Knuth in testimony at Tr. 1178-1180 did not know that Kent and Spokane, Washington ramps were open to the BN under reciprocal switching. Undoubtedly, by his inference, had he known the BN could serve the industry through reciprocal switching, he would have taken the shipments as diversions in the BN/Frisco traffic study.

Witness Round's Appendix M-17 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, to Witness Meier's Exhibit H-111. For information and ready reference, Appendix N attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-184 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix NN, attached, MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 85, Paragraph U, ADM traffic from Minneapolis and Appendix M-18 has to do with shipments of flour from ADM at Minneapolis, MN to Tennessee, Arkansas and Texas. Witness Round corrects and acknowledges on Tr. 6851 that the cars the BN has assigned at the Kansas City, MO plant of ADM offsets the lack of BN and SLSF assigned cars to the Minneapolis, MN plant of ADM (Ex. H-171 page 85). Witness Round is careful to use the term "assigned" at Kansas City Tr. 6848 versus "pool" at Minneapolis Tr. 6847, and does not clearly explain if there is a semantic difference between the two terms. On Tr. 6851, Witness Round acknowledges "We do share in the outbound Minneapolis business because we have assigned cars at Kansas City". The testimony on pages 6851 and 6852 goes on to explain why the BN and FRISCO cars are at Kansas City "assignment" instead of at Minneapolis "pool". Of the 7 sample movements, the Frisco was in the route of 2 of them. The 7 sample cars under MILW traffic study expand to 280 carloads, all of which will move via NUCO in their single line haul from origin to destination. The ADM Milling Company Railroad Assigned Airslide Flour Car Equipment Assignment List dated April 18, 1976 attached shows 120 NUCO cars (marked BN, CB&Q, SLSF and GN) at North Kansas City, MO, Atkinson Mill, Minneapolis, MN, Tabor Milling, Kansas City, MO, Inland Mills, Des Moines, IA, Gooch Mill, Lincoln, NE, and Fuhrer-Ford Milling, Mt. Vernon, IN. The list shows 55 Milwaukee cars at Atkinson Mill, Minneapolis, MN. Obviously, Witness Round's attempt to misrepresent the

relationship of ADM car assignments at Kansas City versus Minneapolis strengthens, instead of diminishes, Milwaukee Road's position that these shipments are capable of being diverted from its line. Attached at the end of this Brief is ADM's list of leased and railroad assigned airslide flour cars.

Witness Round's Appendix M-18 shows the MILW Field Information Form Page Number, Strata and Expanded Loss in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C of Witness Meier's Exhibit H-111. For information and ready reference, Appendix N attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-184 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix NN, attached, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 86, Paragraph W - Lumber from British Columbia origins and Appendix M-19, refers to 500 cars Foss Launch & Tug Co. leased from the railroad car manufacturer and in turn subleased them to BCOL for handling lumber traffic via BCOL-FL&T thence connections. These cars may be captive for movement via Foss, but they certainly are not captive for movement over the MILW as admitted by Mr. Round (Tr. 6855). The BN already has an advantage of a land route from Vancouver, BC (lines 7 and 8 Tr. 6854) plus the advantage of routes both

with Foss and Sea Span, another barge operator, Tr. 6854. Witness Round very effectively explains how allocation percentages can change in lines 18 through 25, Tr. 6853 and line 1 in Tr. 6854. On Tr. 6852, lines 20-25, Witness Round acknowledges the merged BN/Frisco will have advantages handling these shipments from the Pacific Northwest to Memphis and Birmingham. In the BN/Frisco study applicants took two similar moves as divertible; SMS Nos. 1214 (Tr. 1087-8) and 1246. These two BN/Frisco samples alone represent a loss to the Milwaukee of 200 carloads with revenue loss of $255,300.

Again there are duplicates in Witness Round's appendices:

FIF Page No.	Is duplicated in Appendix	$ Overstated
262	M-1	19,170
433	M-1	18,260
615	M-1	14,580
2323	M-1	36,320
		88,330

These duplications reflect an error of overstatement in Witness Round's Appendices of $88,330.

Witness Round's Appendix M-19 shows the MILW Field Information Form Page Number, Strata and Expanded Loss in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C, of Witness Meier's Exhibit H-111. For information and ready reference, Appendix O attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-185 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix OO, attached, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 87, Paragraph X - Lumber and Potash originated on Canadian Pacific and routed via DW&P to Milwaukee and connections and Appendix M-20, deals with shipments responding directly to the objectives of the proposed merger and the effects of improved car supply and service between Duluth on the one hand and Memphis and/or Birmingham on the other. The testimony of Witness T. J. Regan, VP, IMC, Ex. H-31 page 4, referring to "(a) terminating potash unit trains of Canadian muriate of potash at Birmingham, Alabama to gain entry into the deep south with this product", must be considered because of the extensive experience and involvement of IMC, BN and FRISCO in marketing this product in the Southeast. The extensive experience and involvement of IMC and BN in potash unit trains is shown on page 3 of Mr. Regan's Ex. H-31. That applicants themselves adjudged these movements divertible is shown by:

SMS 1233 CN 663604 Vavenby, BC to Springfield, MO

SMS 1252 CN 555566 Houston, BC to Ft. Worth, TX

SMS 6631 CN 555566 Yarbo, Sask. to Caboal, MO

There are more duplications of entries in applicants' Appendices:

FIF PAGE NO.	Is Duplicated in Appendix	$ Overstated
2048	M-2	36,480
2870	M-1 (Also M-2)	37,120
2882	M-2	28,120
2888	M-2	35,680
3139	M-2	34,120
3429	M-2	33,320

FIF PAGE NO.	Is Duplicated in Appendix	$ Overstated
3432	M-2	11,240
4517	M-2	33,680
4521	M-2	32,480
2325	M-1	17,600
2606	M-1	19,240
3968	M-1	18,120
		337,200

These duplications again reflect another error of overstatement in Witness Round's Appendices of $337,200.

Witness Round's Appendix M-20 shows the MILW Field Information Form Page Number, Strata and Expanded Loss in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units; the expansion factors for which are explained in Appendix C of Witness Meier's Exhibit H-111. For information and ready reference, Appendix P attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-186 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix PP, attached, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 89, Paragraph Y - TOFC traffic originated in St. Paul and Appendix 21 pertains to the movement of Freight, All Kinds (FAK), from St. Paul, MN to Texas and refers to his Appendix 21, stating "Nine TOFC movements from St. Paul to Texas". This is not correct as these nine shipments are from St. Paul, MN destined

Morrow, GA. The sample movements fit clearly into the purpose of the proposed BN/Frisco merger. With their improved rail and highway equipment supply (including BN Transport and Frisco Transportation Co.), improved schedules and service between the Twin Cities and the Birmingham gateway these shipments are designed for NUCO encroachment. The short difference of distance (less than 5 miles) between the BN ramp and the MILW to the Gillette Co. plant (Tr. 6830) will be more than offset by the NUCO advantage of service and equipment on the line haul rail movement.

Witness Round's Appendix M-21 shows the MILW Field Information Form Page Number, ("Page") "Strata and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units, the expansion factors for which are explained in Appendix C, to Witness Meier's Exhibit H-111. For information and ready reference, Appendix Q attached in Volume II shows the expansion factor on each of the FIF pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-187 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix QQ, attached, MILW also shows the Divertible and Vulnerable Criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

Witness Round's Ex. H-171, page 90, Paragraph Z - Milwaukee switched origins - St. Paul and Appendix M-22 covers movement of grain from St. Paul. These shipments from FUGTA and Cargill companies, St. Paul, MN into the Southeast and Southwest conform ideally to the purpose of the BN/Frisco merger. With the improved NUCO service of single line

to destination, example Houston, TX and/or major gateways of Memphis and/or Birmingham, also improved car supply, these shipments are especially susceptible to the stated NUCO advantages. The SFE car, MKT car and SOU cars page 90, Witness Round's H-171, are not assigned but are free running cars, which Milwaukee Road anticipates will be replaced by NUCO controlled cars. These shipments are very susceptible to the merged BN/Frisco synergism resulting in revenue loss for Milwaukee Road.

Witness Round's Appendix M-22 shows the MILW Field Information Form Page Number, ("Page") "Strata" and "Expanded Losses" in Dollars for Divertible and Vulnerable shipments. Conveniently, he did not expand the Units, the expansion factors for which are explained in Appendix C to Witness Meier's Exhibit H-111. For information and ready reference, Appendix P attached in Volume II shows the expansion factor on each of the FIF Pages referred to by Witness Round as well as other pertinent detail regarding the movements, including the actual route shipments traversed and the projected new route upon merger. This document was marked as Exhibit H-188 for identification but subsequently rejected, Tr. 7124, to which ruling exception is hereby preserved.

Additionally, as Appendix RR, attached, MILW also shows the Divertible and Vulnerable criteria, corresponding to the appropriate FIF Page number shown on Witness Round's Appendices, used in evaluating each sample movement.

The Milwaukee Road traffic study withstood all attack. It must be given full weight.

D. There is No Evading the Severe Impact of a $14+ Million Annual Income Loss on Milwaukee Road's Reorganization Plans

Applicants took the position in this case that most railroads, with three notable exceptions, could survive the loss of revenue caused by the merged applicants' diversion of traffic by making a few economies (Menk, Ex. H-2, p. 30, Tr. 162, 205-207; Grayson, Ex. H-4, p.7). The three systems which concededly would not be able to adjust to diversions, but are candidates for liquidation therefrom are Milwaukee Road, Rock Island, and Missouri-Kansas-Texas (Menk, Tr. 43, 167). As to MKT, Frisco President Grayson permitted himself the blithe judgment that, if its operations produce a deficit, it would save money by losing business to the merged BN/Frisco (Tr. 318).

The public interest in continued rail service, however, cannot be so easily dismissed. Milwaukee Road operations currently produce a large deficit, but the organization that operates the trains and serves the public is earnestly endeavoring to reorganize itself so as to minimize dislocations and the possibility of Federal intervention by pursuing large-scale abandonments and sales of lines to others. The Reorganization Plan depends utterly for its feasibility upon revenues from operations. Under the Plan, such revenues should, with the truncated system to be operated, produce a profit. Loss of $14.1 million or more in annual revenue to the merged BN/Frisco is a lethal attack upon the foundation of the Reorganization Plan.

Milwaukee Road submits that it has already exhausted the possibilities of practicing economies in operations so as to counter the effects of diversions from a merged BN/Frisco. It is in bankruptcy since December 19, 1977, thus deferring most debts incurred prior thereto

to some future date; it is striving to abandon its money-losing branch lines with a program that must be the most ambitious ever pursued before the Commission:[22] it attempted before its Reorganization Court to embargo its lines extrinsic to the planned "core" system. Milwaukee Road's President Smith testified (Ex. H-132, p.3):

> * * * Although there was some testimony by BN and Frisco officials in the first phase of this case to the effect that those railroads experiencing traffic diversion as a result of this merger need only reduce their costs to counterbalance the diversion, I have no such recourse available to me for Milwaukee Road. * * * If a $14.1 million annual revenue loss is to be included [with six-months system results], the net effect would be to increase the loss by a closely proportional amount. In the current circumstances of Milwaukee Road economics, there is no point to the usual exercise of deducting a "cost of handling" figure to arrive at a net effect. The net effect, I submit, will be further impairment in Milwaukee Road's ability to perform transportation upon reasonable request. * * *

Mr. Smith's point has important ramifications: a $14+ million loss would cause a 5.5% reduction in Milwaukee Road employment (Ex. H-194, p. 5; Koudelka, Tr. 7051), for there are only "limited" opportunities to realize employment reductions through attrition (Ex. H-194, p. 3; Koudelka, Tr. 7052) and Milwaukee Road labor-protection agreements would cause Milwaukee Road to pay protection (ibid.)

> "Q: Positions are eliminated but you incur some protection costs under the agreement as a consequence.
>
> A: That is right." (Tr. 7053)

Even other reductions-in-force as previously agreed "would be thwarted by this particular situation here" (Tr. 7054), and employment losses thereby caused "could be in all crafts and particularly in those areas where it would appear more likely to make reductions" (Koudelka, Tr. 7060).

22/ 55 separate abandonment applications, AB-7 Sub Nos. 31 through 86, have been or are being filed with the Commission since December, 1977. 22 of these, 686.6 miles, have been granted and actually abandoned; 11 more, 520 miles, have been granted but not yet abandoned; 20 more, 1445.5 miles, are presently pending before the Commission; and in Sub-No. 86, 2253.7 miles are proposed for abandonment (F.D. 29078). One, 3.5 miles, was dismissed (Sub-No. 66).

It is idle to speculate on various forms of economies Milwaukee Road might desperately pursue in a vain attempt to counterbalance such diversion of its revenue base; President Smith's testimony cannot be gainsaid: there are none left. That testimony means that diversion of the revenue base by this merger will directly cause cessation of service. As the Reorganization Plan points out, Milwaukee Road continued service on its Chicago-Kansas City route is presently justifiable, but it is highly probable that the revenue losses over the Kansas City gateway will seriously deter the Milwaukee's participation in this competitive market. Thus, perhaps for the first time, the Commission is confronted with direct evidence of service loss as a result of a Commission-approved merger.

On the other hand, it is equally obvious from the Reorganization Plan that retention of Milwaukee Road's Chicago-Kansas City route despite loss of interchange business from the BN/Frisco merger would place this line's entire prospect in immediate jeopardy. Without a Reorganization Plan approved by the Reorganization Court and this Commission, liquidation must follow. As the Commission stated in F.D. 19861, New York, Ontario and Western Railway Company et al. Receivers Abandonment, decided October 10, 1957 (not printed) (sheets 3-4), (reproduced in full in Appendix "T"):

> * * *Following the filing of a proposed plan [of reorganization] and hearing thereon, we refused to approve a plan for reorganization "unless and until further operations of the property disclose the possibility of more profitable operation than is at present apparent." New York, O. & W. Ry. Co. Reorganization, 240 I.C.C. 156, decided May 14, 1940. Subsequent to that date the subsidiaries of the Ontario were brought into the proceeding for reorganization. As a result of further plans for reorganization filed in 1953 and a later date, further hearings were held. However, we declined to approve the plans submitted, found that no plan of reorganization could be formulated or approved either then or in the foreseeable future, and recommended to the court that the reorganization proceedings be dismissed. New York, O. & W. Ry. Co. Reorganization, 295 I.C.C. 346, decided August 16, 1956.

> * * *With this fund and such other funds as were available, the receivers made every effort to secure revenues and effect economies sufficient to permit continued operations. In spite of this, it became evident that sufficient funds would not be available after March 29, 1957, to permit further operation. On March 18, 1957, the court entered an order directing the receivers to suspend and discontinue operation of the properties of the railroads at 11:59 p.m., on March 29, 1957. Pursuant to that order, operation was discontinued and has not been resumed.

It will be recalled that the Trustee of Milwaukee Road has already requested the Reorganization Court for an order discontinuing operations over approximately 70% of the present Milwaukee Road system, denied by the Court by its Order of June 1, 1979 (presently on appeal). Such an initiative may well be renewed should the Reorganization Plan be undercut by loss of income following this merger.

In its General Policy Statement on railroad mergers, 359 I.C.C. at page 199, the Commission, in discussing the purposes of inclusion, stated (49 C.F.R. §1110.10 (e)):

> (1) The Commission believes that the railroad consolidation process should not be used as a means for preserving the systems of financially weak and marginal railroads or for protecting them from undergoing reorganization, if necessary, under the bankruptcy laws. The Commission is concerned with the preservation of service, not of companies or railroad systems * * *

While the Commission has not attempted to apply the General Policy Statement to this proceeding (see above), it is appropriate here to remind the Commission that the "service" Milwaukee Road provides is and has been "essential" in the public interest, as held by the Commission in the Northern Lines and Louisville cases discussed above, to preserve a measure of competition to BN and other railroads in the various markets for rail freight traffic. It should be obvious that an entity other than one railroad is necessary to exist in any given market for competition to exist. By invoking the precedent of the Northern Lines and Louisville cases, Milwaukee Road is claiming the status of "designated competitor"

and the protection from destruction such status demands. Thus liquidation of the existing Milwaukee Road system would not serve the public interest; its service in the designated markets (including, as planned, Miles City, MT - Twin Cities, MN - Chicago, IL) is "essential" as defined by the Commission itself. The Commission remains obliged under the law to estimate the scope and appraise the effects of a merger proposal on competitors and on the general competitive situation in the industry in its consideraion of railroad merger proposals. McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944). In all these circumstances, it is not possible for the Commission to dismiss the diversion forecast by Milwaukee Road under the guise of "minor percentage of revenues" as was done in F.D. 27770/28143, Burlington Northern Inc.-Control-Green Bay & Western, Decision served July 15, 1977 (not printed), p. 65. The diversion forecast in this case by Milwaukee Road is fully 5% of revenues hoped for in the Reorganization Plan.

E. Perceptive Opposition by Iowa is Based on Likely Loss of Essential Service

Ex. H-173, the testimony of the Director of the Iowa Department of Transportation, admitted into evidence without cross-examination at Tr. 7511, voices opposition to the BN/Frisco merger from another viewpoint of preservation of "essential services" (p. 3):

> * * *The Iowa D.O.T. believes the midwest rail structure must be rationalized, but only where efficiencies will actually result, vital rail transportation services retained, and where rail competition is not diminished. In the present proceeding, however, the Iowa D.O.T. believes that important rail services may be lost and competition eventually retarded and, in many areas, lost altogether.

The Commission should note the special transportation competence of Iowa

D.O.T., cited in footnote 1 of Ex. H-173 (p. 6): the State's unique Branchline Assistance Program, with which Milwaukee Road has participated (Ex. H-173, Appendix 1A; H-222, 223) has produced 790 miles of upgraded railroads to serve the State's commerce, at a cost to the State of $29 million to date. Thus, the State's close familiarity with the economic problems of Milwaukee Road and other of its serving railroads, together with the State's close attunement to the needs of its commerce, gives its opinion particular weight (Ex. H-173, p. 13):

> There is a symbiotic relationship between Iowa shippers/receivers and the Rock Island, C&NW, Milwaukee and ICG. Both need and depend upon the other; one for services, the other for traffic and revenues. * * *

p. 15:

> * * *The merger of the BN and the Frisco could very well upset what otherwise is a productive and successful business relationship.
>
> The reason for such a conclusion becomes clear when one identifies where the lines of the * * * Milwaukee * * *are located in the State. * * *they are located in the principal, grain-growing areas of the State. * * *

p. 16:

> Turning to the BN, the situation is quite different. * * *the BN east-west mainline in Iowa is located along the State's southern tier of counties. * * *Relatively speaking, those counties are less agriculturally productive and more sparsely populated. There are no large population centers located on the BN mainline. * * *

p. 19:

> The inescapable conclusion is that Iowa, a major agricultural and industrial state in our nation's Heartland and a principal grain exporter, greatly depends upon the rail transportation services provided by many of the same rail carriers who oppose the BN-Frisco merger and <u>who could be operationally and economically destroyed if the</u> merger is approved. [emphasis added]
>
> The projected figures for the Milwaukee are even worse. * * *the Milwaukee projects a loss of approximately 13 million dollars. The Milwaukee suffered a net loss of 69 million dollars in 1978 and has dangerously close to running out of operating cash during the winter of 1978-1979. It

> is difficult to imagine how the Milwaukee would be able to continue its rail transportation service to Iowa's shippers and the rest of the shippers along its system while suffering greater losses as a result of a BN-Frisco merger.* * *

p. 22:

> The BN-Frisco merger will do very little toward revitalizing the granger railroads serving Iowa and the midwest. * * *it also could serve as a stimulus to more railroad operational and financial difficulties, more railroad reorganizations and liquidations. * * *

Milwaukee Road's continued service over its main line to Iowa interior points (Chicago-Omaha) is not a part of its Reorganization Plan.[23] However, permutations of that Plan may permit continuance of Milwaukee Road service in the grain-gathering areas referred to in the Iowa testimony. Milwaukee Road service along eastern Iowa on the Chicago-Kansas City route will continue, if as stated the Kansas City interchange traffic does not disappear through the diversionary impact of this merger.

F. Other Alleged Public Interest Benefits Would Not Occur Absent Traffic Diversions

Applicant's claims of "public interest justification", discussed at pp. 3-4 above, are illuminative; their approach is simply to list a few of the most obvious concomitant results from a merger of railroads, many of which could be accomplished without merger, and offer these to the Commission as uniquely

23/ In F.D. 28883F, Milwaukee Road has pending before the Commission an application for approval of a trackage-rights contract with C&NW to substitute C&NW's main line, now being rehabilitated using 4-R Act §505 funding, for its own between the junctions of Clinton and Tama, IA. Despite the savings in operating and rehabilitation costs available from this arrangement, it appears that lack of sufficient through traffic will not permit continuation of a Chicago-Omaha route.

the product of the proposal. But it must first be borne in mind that

> * * * the term "public interest" as thus used [in the statute] is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * * [emphasis added]

New York Central Securities Corp. v. United States, 287 U.S. 12, at 25 (1932). Each of applicants' claims must be examined in light of those criteria for acceptability, not taken from applicants as Gospel. When examined in that light, it is seen that they would scarcely justify such a corporate realignment without the additive of the traffic diversions anticipated by protestants or conceded by applicants' in and of themselves, the various "public interest justifications" do not justify a favorable order from the Commission.

Indeed, applicants admit as much. The testimony of BN's Donohue, described by BN's Chairman Menk as the co-chairman of the joint study team (Ex. H-2, p.19), ties together the "attraction of traffic" with the "consolidation of functions and activities of the two companies," placing the traffic additive first (Ex. H-9, p.3); his co-chairman did the same (Ex. H-49, p.3). On cross-examination, Mr. Donohue affirmed that 50% of all merger benefits he attributed to the transaction would be derived from traffic diverted (Tr. 482); his chief, Mr. Menk, could not separate traffic gains from other benefits (Tr. 91-92).

Applicants represented throughout their case as perhaps the most salient transportation advantage to be gained from the merger the new single-line service between them. But applicants did not even study

potential improvements in current service routes (Donohue, Tr. 495); in the judgment of their first witness, there was insufficient traffic to justify run-through operations short of merger (Menk, Tr. 69; Grayson, Tr. 312; Able, Tr. 2034). When diversions add to applicants' traffic base, however, such operations will be commenced (Able, Tr. 1813-4, 2091).

Applicants also touted the supposed "synergistic effect" that would result from combination of their car fleets (Application, Vol. 1, p.59) - an effect that would produce a "reduction" of 800 units in the combined car fleet (Ex. A-16, Appx. 30; Ex. H-35, p. 45). It turned out, however, that this exercise merely showed a supposed reduction in otherwise-required car purchases (Able, Tr. 1839-40) and "has no relationship to [BN's] ability to supply cars or not supply cars" (Able, Tr. 1840). It became apparent that the "improved car supply" study was something serendipitous when the witness denied that the incentive per diem program of the Commission had any influence on the results of the study (ibid.) and, in view of much testimony that BN presently has a severe car shortage (Dewey, Tr. 1504; Regan, Tr. 1638; Miller, Tr. 3093; Hill, Tr. 3221; Tolan, Tr. 3235, 3277-8; Bush, Tr. 3384), a mere cosmetic for this proceeding. What remained unexplained was why BN and Frisco never joined one of the "freight-car clearing-houses" set up with Federal sponsorship [24] to assist car supply problems (Menk, Tr. 70; Able, Tr. 1815); and why their witness Regan was permitted to point up the peculiar declination of the merged system to eliminate the home loading car rule

24/ A Prospectus for Change in the Freight Railroad Industry, (U.S.D.O.T., 1978), p. 89.

(Tr. 1625; compare, Tr. 1662-3). Clearly, "improved car supply", particularly in view of the impossibility of estimating the effect of reroutings of traffic internally thereon (Ex. H-35, p. 26), is an unsubstantiated claim.

Applicants also proposed minor reductions in overhead staff (Ex. H-53), but BN's Chairman offered continued employment to all Frisco senior management (Menk, Tr. 102), with one stroke thereby destroying what is supposed to be a prime merger economy. [25] Another claimed economy, joint purchasing, could be done now without merger, but BN policy stands against it (Blakeslee, Tr. 3300); the calculations are suspect, in that the higher scrap prices shown were chosen from whichever of applicants obtained them (Blakeslee, Tr. 3307), and the fact that BN already takes its maximum discount on several railroad supply items (Blakeslee, Tr. 3291). BN purchases were not even considered in the "savings" shown (Blakeslee, Tr. 3293).

"Innovative rate making" opportunities were also cited by applicants as a benefit of their merger (Application, Vol. 1, p. 5; Round, Tr. 750), but their supporting shippers had to agree that they could not count on this (Regan, Tr. 1622; Tolan, Tr. 3256-7), and should occur without merger (Regan, Tr. 1660; Bush, Tr. 3374).

Applicants failed utterly to calculate any benefit whatever from increased productivity (Donohue, Tr. 510-11), thereby ignoring what

25/ Note that the average employee salary of applicants is $21,500 per annum (Smiland, Tr. 3326) plus fringe benefits (Smiland, Tr. 3325). There is little doubt that Frisco senior management will accept this offer (Grayson, Tr. 291).

has been oft-cited by students of the railroad industry as one of its foremost problems.[26] Directly affecting railroad productivity is terminal congestion; applicants' proposal does nothing to relieve the generalized problem at their interchanges at Kansas City, just between applicants (Menk, Tr. 174; Able, Tr. 2037) but without commitment to maintain the current quality of such interchanges with other railroads (Able, Tr. 2038-9, 2046-50); in fact, worsening of the situation at Kansas City may well occur upon merger with the applicants' elimination of their interchange (Grayson, Tr. 330-1; Able, Tr. 1887, 2042-3). The same may occur at St. Louis (Able, Tr. 1785).

Applicants' merger may cause problems. Their information/computer systems are incompatible (Gagnier, Tr. 3282), thereby impelling conversion of the Frisco system to that of BN at a cost of $1.175 million (Ex. A-16, pp. 27-28). The systems are used "to provide the operating supervisor with information about the movement, location and status of cars and trains..." (Ex. H-45, p.2), and a careful phase-in program is necessary (id., p.3). With the diversions of traffic following merger, an unknown amount must be expended to handle the increased traffic due to line-capacity problems (Donohue, Tr. 523, 484-5; Able, Tr. 1843); although some calculation of line capacity was accomplished (Able, Tr., 1849-50) it was done only on the one line identified (Able, Tr. 1852-3), leaving the assertion that sufficient capacity exists on all lines (Able, Tr. 1845) subject to the "gut feeling" judgment applied (Able, Tr. 1854). The problem is no small one: hundreds of millions are

26/ A Prospectus for Change in the Freight Railroad Industry, U.S.D.O.T., 1978, p. 92, citing Improving Railroad Productivity (Washington, 1973), pp. 253-4.

being expended by BN at this time to relieve capacity problems (Menk, Tr. 108; Able, Tr. 1848; Miller, Tr. 3094-5; Tolan, Tr. 3244). The least miscalculation, the slightest error in attuning the Frisco data system, the most minor delay in that program, therefore, could easily cause the monumental foul-up experienced from the identical problem following the Penn Central merger.[27]

G. The Merger is Proposed for Profit

With the above discussion in mind, the reason for the proposed merger should be considered. The idea apparently came from a meeting between Messrs. Menk and Grayson in Pittsburgh in early 1977 (Menk, Tr. 112), which followed on years of intimate, mutually respectful acquaintanceship of the principals (Ex. H-2, p. 1; Grayson, Tr. 287-290; Menk, Tr. 113). Frisco had for 36 years been a profitable operation (Grayson, Tr. 295) proud of its ability to win a high proportion of the most difficult traffic to obtain, "overhead" or "bridge" traffic (Grayson, Tr. 296; Menk, Tr. 228-29; Knuth, Tr. 1283, 1469; Walters, Tr. 1574-5), well maintained (Ex. H-2, p. 9; Exh. H-4, p. 13; Grayson, Tr. 295). What brought agreement on merger, it appears, was Frisco's fear of its future without a merger, in view of likely other railroad mergers in the territory (Grayson, Tr. 296-7), an impulse to obtain the best price while still profitable (Grayson, Tr. 306), but with no immediate threat to that profitability. Merger as the form of affiliation was chosen over control at some unspecified point in the discussions (Grayson, Tr. 292-3, Menk, Tr. 231-5; Rose, Tr. 433; Donohue, Tr. 475).

27/ Daughan and Binzen, The Wreck of the Penn Central, at 117-119 (Little, Brown, 1971).

Those discussions resulted in an agreement which, to obtain Frisco shareholder approval, maintained Frisco's dividend rate (Rose, Tr. 447-8, 450A-451).

Of all potential threats to the existing Frisco, the pending Southern Pacific (SSW) purchase of the Rock Island's St. Louis-Santa Rosa line pending Commission approval in F.D. 28799 (Sub-No. 1F-6F) would seem the most imminent: but Frisco has stipulated with Southern Pacific, with the concurrence of BN (Stipulation dated December 8, 1978, transmitted by letter dated January 4, 1979, to Administrative Law Judge Clerman) that it does not oppose "SPT or Cotton Belt acquisition of Rock Island trackage and facilities..." in the case (attached "Agreement" of same date, ¶ 5, p. 4). A similar submission was made in F.D. 28799 by letter to ALJ Fitzpatrick dated March 28, 1979. On its eastern connections' proposed consolidation in F.D. 28905 (Sub-No. 1F), CSX Corporation-Control - Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Frisco has proposed a Stipulation of settlement which would tend to preserve its present through routes and joint rates with the applicants ("St. Louis-San Francisco Railway Company's Summary Statement", filed April 23, 1979, therein). Other than these two proceedings, there is no identifiable threat, potential or probable, to Frisco's enviable position in winning a traffic base and, as seen, Frisco is able to meet and master such threats as do appear.

It certainly cannot be said that either applicant is in need of merger to save its service in the public interest. Frisco's proud earning record for the past 36 years is here before the Commission (Grayson, Tr. 295), and BN's wealth was thoroughly explored in the Northern Lines Merger proceedings, 328 I.C.C. at pp. 464-473, summarized

by the Commission's finding "[the applicants] are large, strong, and prosperous railroads. And, they are growing stronger." Id. at 471. Since then, the Commission has BN's Forms R-1, its Annual Reports to Shareholders, and the records of the several rate proceedings [28] to trace the new source of wealth that has developed: BN's transportation of western low-sulfur coal. Additionally, the Commission's authorizations to BN to issue its stock, bonds, notes and equipment trust certificates in this past year alone permitted BN to replenish its capital and acquire rolling stock to a cumulative amount of $750,625 million. [29] If ready access to capital is any indicium of wealth, BN is wealthy: although it is a rare event today for a railroad to issue equity (Rose, Tr. 429; Smith, Tr. 560), BN's 1977 issuance of $100 million preferred stock was sold out within a week of its offer without difficulty (Rose, Tr. 432). At the same time, Milwaukee Road was frozen out of the market: the Trustee's Certificate authorizations cited on page 11 above were made upon representation and evidence that Milwaukee Road had only the Federal Government as a source of working capital.

The Commission need hardly be cautioned that BN representations (Menk, Tr. 46) bemoaning a relatively low rate of return for its Transportation Division are to be taken cum grano salis. It must be remembered first of all that BN's huge line-upgrading and construction investments are expensed, which if capitalized would exhibit the truer

28/ I.C.C. Docket Nos. 37105, 37162, 37169, 37135, 36180, 37021, 36944, 37029, I&S 8199, I.C.C. 36719, 36579 - all within the last 5 years.

29/ F.D. Nos. 27969, Orders served March 16 and 30, 1979, $100 million notes and pledge bonds; 28757, Order served June 19, 1978, $50 million bonds; 28823, Order served September 8, 1978, $26 million mortgage notes; 28904, Order served December 15, 1978, $14,625 million ETCs; 29024F, Order served May 9, 1979, $25 million notes; 28995F, Order served May 11, 1979, $510 million preferred stock; 29076, Order served August 1, 1979, $25 million notes.

rate of return relied upon by the investors in its financial program (Rose, Tr. 436); then, BN's Natural Resources Division, product of its land grants (328 I.C.C. at 465; Menk, Tr. 103), supports the BN Transportation Division (Ex. H-2, pp. 15-17; Smith, Tr. 574, 591), exactly as intended by the Act of Congress of July 2, 1864, which incorporated BN's predecessor and granted it Federal lands.

Thereby, "the bottom line" is produced (Ex. A-18(vii), p. 8): a merged company showing $108.08 million annual net income for the second year following merger. This is the "greater financial strength" cited as a public-interest justification for the merger (Application, Vol. 1, pp. 4, 7, 52, 56, 60, 65); a "synergistic effect" in that "the merged company will be financially stronger than either of the applicants standing alone" (id., p. 65). "Financial strength" means improved rate of return, return on equity, and ability of the merged company to enter the equity and debt markets (Menk, Tr. 60), and Milwaukee Road concurs. The merged applicants will be able exponentially, not arithmetically, to expand their return on investment to an extent overwhelming to competitors. They will be enabled thereby to operate more trains, buy more rolling stock, improve their plant, hire more salesmen, and advertise their services to a degree unmatched by any but their strongest competitors. Milwaukee Road's competition, even if reorganized, will likely disappear in the Chicago-Kansas City market; in other markets, it will diminish to negligibility. Milwaukee Road submits that the public interest will not tolerate that result. The proposal must be denied.

III
MILWAUKEE ROAD CONDITIONS MUST BE IMPOSED IF THE APPLICATIONS ARE GRANTED

A. Enforced Restructuring of the Proposals is In the Public Interest

The record herein permits no doubt, no hope that applicants' implacable hostility to the imposition of conditions on their proposal will ameliorate; nor can the Commission find any solace in the record for the slightest belief that applicants will voluntarily act to mitigate the chaos among their "weak sisters" caused by their merger. If the merger is to be approved at all, it falls to the Commission to do its duty in the public interest as stated in its General Policy Statement: "...condition its approval upon the willingness of the applicants to restructure their proposal." 49 C.F.R. §1110.10(e)(2).

It has been shown above (pp. 17-21) that applicants' proposal is gens inconnu in the context of railroad industry restructuring proposals of the last several years, save in its reduction by one of the number of systems: that it is in the grand tradition of James J. Hill, the "Empire Builder" of the 19th century Northern lines.[30] What even more forcefully springs from the pages of this record, however, is the cold indifference of applicants to the fate of other, competing rail systems, even in the face of concern by some supporting shippers, including the Department of Defense (Bath, Tr. 1912; Boyce, Tr. 1951; Dowd, Tr. 2008-9; Miller, Tr. 3097). BN simply sees itself as not involved (Menk, Tr. 160, 167-8), and Frisco in effect holds that it's someone else's problem (Grayson, Tr. 303-4, 313).

30/ See Bush, "Western Rail Mergers - Then and Now," 42 I.C.C. Prac. J. 138, at 139 (Jan./Feb., 1975).

Similarly, the declaration in the Application (Vol. 1, p. 30) and in the Agreement of Merger and Plan of Reorganization (Ex. 9 to Application, p. 9) that no conditions on the merger be allowed but those protecting employees and those of Detroit, T. & I. R. Co. Control, 275 I.C.C. 455, "as adapted to a merger in Great Northern P. & B. L. Inc. - Merger, 331 I.C.C. 228, Conditions (1) through (6)" (331 I.C.C. at 352) was strictly applied in applicants' case to reject the several trackage rights proposals (Menk, Tr. 81-2) and indemnification for losses (Menk, Tr. 168), even to the application of the "DT&I" conditions themselves (Round, Tr. 724, 728, 729), avoiding thereby any BN commitment on the meaning thereof (Tr. 720-1, 733-4, 738). Of course, applicants must be playing the same game played in the Northern Lines Merger case itself, where their hostility to all conditions found their application denied by the Commission, only to be granted on reconsideration when applicants agreed to the most important of those; denial of the instant application can be expected to lead applicants to reason if they really desire the merger. In view of applicants' stipulations with other railroads violating their own principles of "no conditions," such as that with Southern discussed above, that with Missouri Pacific (Tr. 790), and that with Southern Pacific granting trackage rights "in the Portland, Oregon area to provide SPT access to the North and South Rivergate industrial areas over BN owned trackage" (Stipulation dated December 8, 1978, pp. 3-4, ¶9), it will be readily understood that applicants' principles will readily yield to expediency, but there is no force other than the Commission's conditioning of its approval to require such realism.

In view of its own historical relationship with BN, Milwaukee Road expects no respect or regard from applicants for its situation, nor voluntary relief in any form from them. The extent to which BN voluntarily dealt with the "Milwaukee Road problem" was sought to be spread on this record, with only limited success. What was allowed to appear was the history of Milwaukee Road/BN coordination and inclusion studies (Menk, Tr. 54-5; Able, Tr. 1802-3), with the important exception of their termination, objection to which was sustained by the Administrative Law Judge (Tr. 1806), and as to which proffer or proof had to be made (Tr. 1806-7).[31] That proffer was to the effect that, when Milwaukee Road found BN to be stalling in negotiations, and filed its formal petition for inclusion in BN under Condition 33 of the Northern Lines merger, BN broke off negotiations. Since then, some negotiations have resumed, but the Commission's file is still bare of any results of Milwaukee Road/BN negotiations.

The Commission should exercise its power to "improve [Milwaukee Road's] position" with respect to applicants following this merger, if it is to be approved. The record reflects that Milwaukee Road has provided essential rail services (Regan, Tr. 1629; Miller, Tr. 3088-9; Bush, Tr. 3377-9, Tolan, Tr. 3230; Ex. H-173; "Statement of Position of North Dakota Public Service Commission," filed April 6, 1979, pp. 4-5). The record also reflects the concern felt by many shipper and public witnesses that essential services be preserved, that the Commission protect affected railroads, and that conditions on the merger be imposed

31/ Pursuant to Rule 85 of the Commission's Rules of Practice, exception to this ruling and previous rulings on the same general subject (Tr. 1796, 1800) are not waived but pressed.

to effect that (Dewey, Tr. 1515-7, 1590-1; Regan, Tr. 1645-6; Bath, Tr. 1909, 1912, 1922; Dowd, Tr. 2026; Tolan, Tr. 3238-9; Rinner, Tr. 1776). Conditioning a merger to assist the preservation of essential rail services is perceived as one form of "private sector solution" strenuously sought by Federal and State agencies.[32] That form of assistance to Milwaukee Road service, in addition to its reorganization, abandonment, sales, and other initiatives cited on pp. 4 and 5 of Milwaukee Road President Smith's Ex. H-132, in the several Conditions sought by Milwaukee Road herein, is certainly a legal means to assist Milwaukee Road's restructuring, although it may be involuntary by applicants. As testified by Milwaukee Road President Smith: "Public policy ought not to allow economic advantage to be taken of the economic distress of an erstwhile full-fledged participant in that policy." (Ex. H-132, p. 4).

If this merger is approved by the Commission without the conditions sought by Milwaukee Road, its Chicago-Kansas City market is placed in jeopardy despite the fact of coordination with Rock Island from the trackage rights approved in F.D. 28437. If the Commission were to deny such an abandonment, thus working havoc with the Reorganization Plan, "cashlessness" caused directly by this merger's diversions of traffic may force the Trustee to seek embargo authority from the Reorganization Court as he did during the spring of 1979. If the Reorganization Court is then satisfied with his showing of that status, it will authorize an embargo as in the New York, Ontario and Western case cited above; and the Commission will then be forced to deal with maintenance of essential services under the "directed service" provisions of 49 U.S.C. §11125,

32/ A Prospectus for Change in the Freight Railroad Industry, U.S. D.O.T., 1978, p. 87; North Dakota P.S.C. Statement of Position herein, p. 4.

with payment of deficit operations required thereby from the United States Treasury. Without exaggeration, it has appeared from the public record of statements by the Secretary of Transportation, the Chairman of the Commission, and State officials that such an outcome for Milwaukee Road's financial difficulties is to be avoided if at all possible; that a "private sector solution" to those difficulties is the grand desideratum. Milwaukee Road's proffered conditions on this merger form a part of that program.

B. Milwaukee Road Condition No. 6:[33] Access to BN Coal Fields

By Decision served October 27, 1978, the Commission allowed Milwaukee Road to file a de novo application for trackage rights over BN from Miles City, MT (the point of connection between Milwaukee Road and BN) to end-of-track in the coal fields near Colstrip, MT and Kuehn, MT, replacing an application for such trackage rights "to all present and future mines on BN in Montana" which had been rejected by the Commission as incomplete and improper (Sub-No. 15).[34] The new application was duly filed, corrected by later submissions circulated with letter dated November 17, 1978, and accepted by the Commission and assigned Sub-No. 22 on November 28, 1978, 43 Fed. Reg. 55556 (cf. Decision therein served February 9, 1979), styled Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor - Trackage Rights - Over Burlington Northern, Inc. Between Miles City, MY and Big Sky and Kuehn, MT, a Distance of 138.9 Miles.

33/ Milwaukee Road Condition No. 5, use of BN's Dayton's Bluff Yard, is here withdrawn. Conditions Nos. 1 through 4 were dismissed by decision served December 5, 1978, in Sub-Nos. 13F, 14F, 16F and 17F.

34/ "Improper" supposedly for reason that "future" mine operations could not be quantified, to which ruling Milwaukee Road objected. See, "Petition for Leave to File...", dated September 1, 1978.

The Condition reads (Ex. H-136, Tr. 5702, 5705):

> Granting of trackage rights over Burlington Northern Lines to Milwaukee Road to enable Milwaukee Road with its own trains, power and crews to serve all existing coal mine facilities located on the Colstrip and Kuehn branches of Burlington Northern in the State of Montana, to be applicable only on movements to Milwaukee Road destinations and industries (including destinations and industries served by the Milwaukee Road at common points with Burlington Northern) also to destinations on connecting lines that are not served by Burlington Northern; upon such fair and reasonable terms as BN and Milwaukee may agree upon, or as may be prescribed by the Commission in the event of their failure to agree.

Under this Condition, Milwaukee Road would operate over BN, using existing trackage rights from Miles City to Sarpy Junction, thence over BN by these new rights to three mine areas: Colstrip, Big Sky, and Absaloka. From Colstrip, it is 29.8 miles to Nichols, MT, via BN branch line; from Nichols, it is 51.5 miles to Miles City via BN main line, a total of 81.3 miles; from Big Sky, it is 34.8 miles to Nichols; from Absaloka, it is 38 mles to Sarpy Jct. via BN branch line, thence 66.1 miles via BN main line to Miles City, a total of 104.1 miles. See Sub-22 Application, ¶(d)(5).

The Condition is sought to permit Milwaukee Road direct access to the mines for coal traffic presently delivered by Milwaukee Road to its customers at Twin Cities and in Wisconsin, which traffic Milwaukee Road now received in interchange from BN at Miles City and Twin Cities. Application, ¶(e)(2), Ex. C-13 thereto; Ex. H-115, pp. 2-3. At present, Milwaukee Road traffic of this nature is controlled by Burlington Northern as origin carrier, so that no more than one-half the traffic is allowed over Milwaukee Road from its first junction point with BN (ibid.). If the Condition becomes operative, Milwaukee Road single-line service would

then be available to its customers (Sub-22 Application, ¶(a)(1)). Milwaukee Road financial viability would be improved, its position as intramodal competitor of BN would be enhanced, all by obtaining greater revenues from the increasd haul (Sub-22 Application, ¶(a)(3); Ex. H-115.). This additional traffic is expected to yield $12.7+ million annually to Milwaukee Road (Sub-22 Application, ¶(e)(1)-(2); Ex. H-113, Tr. 5135).

At present, the Milwaukee Road line between Miles City and the Twin Cities is significantly underutilized and can accomodate the increased traffic immediately (Sub-22 Application, ¶(e)(2)(b); Ex. A-13, dated July 26, 1978, sheet 2; Ex. C-13; Ex. H-115). The application is supported by two receivers, one mine operator (Ex. H-162, 163, 164), and the North Dakota Public Utilities Commission, and is opposed by BN with a farrago of objection but with the significant admission that it "cannot estimate the consequences to [its] ability to provide general transportation service..." from Milwaukee Road operations under the Condition (Ex. H-198, p. 12; cf. H-236, p.3). Operations under the Condition would offset, to a degree, the reductions in employment otherwise caused by the diversion of traffic from Milwaukee Road due to the merger (Koudelka, Tr. 7062; cf. Sub-22 Application, Ex. 10).

(1) Milwaukee Road's Estimate of Traffic Gains is Far More Accurate than Applicants'

It is important to lay at rest at the outset the controversy between Milwaukee Road's Ex. A-15 and H-113 traffic study for the Sub-22 Application and the rebuttal offered by applicants through their Ex. H-198. By Decision served October 27, 1978, on page 2, it was stated "Milwaukee Road must comply with the ICC Consolidation Procedures in

filing its new [Sub-22] application." Milwaukee Road did so in its Ex. A-15 and verified statement Ex. H-113. That study was based on BN waybills and revenue settlement abstracts (Ex. H-113, sheet 3); 677 movements were selected, of which 455 movements were determined not divertible (id., sheet 4). 222 movements were considered divertible from BN which, when enhanced to 100% amounted to 22,200 cars yielding a gain of $12,791,308 in gross revenues annually to Milwaukee Road (id., sheet 5).

Cross-examination on this study was not directed to its methodology or intrinsic accuracy at all: it sought only to elicit the possibility of future traffic (Tr. 5132 - 5135). On rebuttal, the BN witness confessed that he had no specific criticism of the traffic study (Michon, Tr. 7187). Indeed, the rebuttal statement Ex. H-198 was not a counter-traffic study at all, but a statement of opinion that a historical traffic study for the traffic involved was inappropriate (Ex. H-198, p.2). Ipso facto, applicants' rebuttal evidence to Milwaukee Road's traffic study does not reach the level commanded by the Commission in the Decision cited. It therefore earns little or no evidentiary weight.

Milwaukee Road's rebuttal evidence to Ex. H-198 was the testimony of its Vice President-Market Development & Pricing Glenn F. Reynolds, H-236. He put the Ex. H-198 thesis aside through the telling observation that, even if correct, "the Commission does not limit its conditioning power to match an affected railroad's proven losses from an approved merger..." (Ex. 236, p. 3); that the Ex. H-198 equivocation on effects of the Condition on BN "leaves the Commission with no claim pending by Applicants that the sought Condition will impair the merged company's ability to continue to perform its common carrier responsibility" (ibid.).

He conceded, as did Milwaukee Road witness Brennan (Tr. 5135) that the projected $12.7 million annual revenue gain shown by Milwaukee Road's traffic study "may be expanded to reflect current traffic growth," but rejected the "$50+ million projected by Mr. Michon" (in Ex. H-198) (ibid.). His testimony went on categorically to destroy each and every presumption built into Ex. H-198 (Ex. 236, pp. 3-7). Applicants did not cross-examine Mr. Reynolds on this testimony (Tr. 8026-7), wherefore it stands without question as the best evidence before the Commission. Milwaukee Road's traffic study, Ex. H-113 and Ex. A-15 of Sub-22 Application must be given its full evidentiary weight and the BN opinion, Ex. H-198 disregarded.

(2) BN Attacks on Milwaukee Road's Past Pricing Policies are Irrelevant and Must be Disregarded

Strangely, BN's most virulent attack on Milwaukee Road's proposed Condition came through expressions of disgruntlement over Milwaukee Road's pricing policies of the past (Ex. H-196) which became so extreme that a motion to strike was granted (Tr. 7160-7162). This attack found its way into Ex. H-198 (p. 14) and was thoroughly quashed by Ex. H-236, Milwaukee Road's rebuttal by its Vice President Reynolds (Ex. H-236, pp. 7-8, Appx. B). Mr. Reynolds claimed credit for the several rate adjustments complained of (Ex. H-236, p. 8), denied that Milwaukee Road engages in "cash flow" pricing as a matter of policy (ibid.) and withstood a tedious cross-examination on many of the rate actions (Tr. 8027-56) - an examination that amounted to simple argument

as to the prudence of many of the rate adjustments involved.

The attack, however, proves nothing other than the fact that Milwaukee Road did make rates which annoyed BN. Milwaukee Road stands on its position, that doing so tended to fulfill the Commission's intent (Tr. 7160). In that Milwaukee Road here declared that it does not intend to price below cost (Ex. H-236, p. 8) and the Commission continues its jurisdiction over unreasonable rates, e.g. No. 36792, Incentive Rate on Coal - Belle Ayr, WY to Council Bluffs, IA (Decision adversus BN served June 21, 1978); No. 37105 (Sub-No. 1), Increased Rates on Coal, Colstrip and Kuehn, MT to Minnesota, July, 1979 (served June 29, 1979), the public interest will be protected. If the instant Condition becomes effective, BN may be further annoyed by possible Milwaukee Road use of contract-rate freedom for the traffic (Ex. H-236, p. 8). The attacks on Milwaukee Road prove nothing.

(3) Substantial Shipper Support and Past BN Anticompetitive Practices Exhibit the Need for the Condition in the Public Interest

Even though Milwaukee Road's proposed Condition 6 is structured in such a way that it would permit Milwaukee to participate in only a miniscule portion of the coal traffic handled by BN, three shipper and receiver witnesses realized the potential benefit that would be afforded them if this Condition were permitted to take effect and submitted testimony in support thereof. This testimony is contained in verified

statements of Harold L. Frye, Fuel Procurement Supervisor for Wisconsin Power & Light Co., Madison Wis. (Exhibit H-164), D. H. Peterson, General Superintendent Fuel Supply, Northern States Power Co., Minneapolis, Minn. (adopted by Robert Kermes, Superintendent of Fuel Supply Development) (Exhibit No. H-163) and Bruce S. Graving, Manager-Accounting and Sales, Western Energy Co., Butte, Mont. (adopted by Martin A. White) (Exhibit H-162).

The granting of proposed Condition 6 is extremely important, not only to Milwaukee Road, but to Western Energy Co. and Northern States Power Co. as well. Testimony of Martin A. White (Tr. 6362) illustrates the inadequacy of service now being supplied by Burlington Northern. Milwaukee Road stands ready, willing and able to fill that void if granted permission to do so.

The verified statements of all three witnesses illustrate their strong feeling of a need for some alternative rail carrier to the monopoly position now enjoyed by Burlington Northern. Witness Frye (Exhibit H-164, p. 3) recognized the potential for a saving in transportation costs as well as the flexibility that would be afforded by an alternative carrier.

Witness Kermes (Exhibit H-163) feels that the availability of a second carrier would assure that equipment supply would be better, service improved and transportation costs kept at a reasonable level. Witness White (Exhibit H-162) cited the need for Milwaukee Road's continued and enhanced viability in Montana.

These witnesses were bitterly attacked by BN counsel in cross-examination, with improper suggestions that the witness was misled by Milwaukee Road (Tr 6368-9); that Milwaukee Road rate increases would follow its operations (Tr. 6371); that power companies ought to have competition (Tr. 6385-6); that the witness appeared in furtherance of a rate case (Tr. 6386); that Milwaukee Road "is in worse shape than anybody" (Tr. 6387); that guaranteed-volume rates eliminate competition (Tr. 6388). Cross-examination was productive, however, in bringing out the facts that BN counsel was misinformed (Tr. 6363, line 21); that BN "in Montana [has] a very good position because of the land grant of coal" (Tr. 6364), requiring the miner to produce it and pay BN a royalty (Tr. 6365), and that there is no coal located on Milwaukee Road's lines (Tr. 6365-6; compare, H-236, p. 7); that BN presently monopolized the shipment of coal in the area (Tr. 6366); that Milwaukee Road "is having trouble surviving because of the fact that [it] does not have a lot of traffic in that area" (Tr. 6367); that the shipper "would enjoy the opportunity to talk to another railroad" because of BN's lack of investment in equipment (Tr. 6370); that where BN is unable to transport coal traffic, it would lose no revenue to Milwaukee Road (Tr. 6371); that BN has "a predominance" over Milwaukee Road from the coal traffic originated (Tr. 6377); that there would be no difficulty for Milwaukee Road to service the High Bridge (Twin Cities) generating station beyond that presently experienced with BN service, should Milwaukee Road gain access

to the mines (Tr. 6382); that Milwaukee Road has some available cars for the traffic (Tr. 6387), and that Northern States Power Company could purchase its own cars (Tr. 6388);[36] that Milwaukee Road's line proved useful for BN on the occasion of a BN derailment (Tr. 6394); that diversion from BN may not occur depending on the Wisconsin Department of Natural Resources' decision as to emission controls (Tr. 6396-7; compare, H-236, p. 5); that the witness understood the criticality of the Condition to continued operations of the Milwaukee Road Twin Cities-Miles City line (Tr. 6397-8, citing to Smith, Tr. 5554).[37]

This record reflects BN's market dominance in the transportation of low-sulfur coal from the West. The traffic is the only substantial increase on BN (Menk, Tr. 220); BN is the only railroad serving the Belle Ayr and Eagle Butte mines (Miller, Tr. 3066, 3083), giving more potential for traffic growth than any other commodity now carried by BN (Menk, Tr. 105-106), with increasing importance to BN (Donohue, Tr. 535). The enormous volume of this traffic was restated by BN's witness Donohue at Tr. 536-7. The verified statement of Milwaukee Road's witness Beckman, Ex. H-115, extensively quotes from the BN's Annual Reports to Shareholders (sheets 3-4) and referred to the Commission's own recognition of "the virtual monopoly position of the BN in serving the coal fields of Montana and Wyoming" (sheet 2). In this, his reference was to the Commission's Decision in No. 36792, Incentive Rate on Coal - Belle Ayr, WY to Council Bluffs, IA (served June 21, 1978), wherein on pp. 3 and 4

35/ It should be noted that mine or utility-owned coal cars are the norm in the transportation of this traffic (Donohue, Tr. 538; Dewey, Tr. 1503; Miller, Tr. 3069, Olmo, Tr. 3407) and that the utility chooses the route of movement (Tr. 1517; Miller, Tr. 3068; Olmo, Tr. 3407).

36/ As the reviewing Court noted in Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19, at 26: "* * *Shippers are the primary source of all freight traffic and their opinions are, accordingly, of impressive weight."

BN's monopoly power was discussed and condemned. No questions were asked of Mr. Beckman on this testimony (Tr. 5139-43). Then, BN's traffic power was further exemplified by Milwaukee Road witness Reynolds' Ex. H-236, p. 6, where he related how BN cut Milwaukee Road out of traffic to central Wisconsin by making a rate solely with Green Bay & Western, how BN rejected Milwaukee Road rolling stock just to obtain its long haul and greater revenues (Ex. H-236, p. 6, Appx. A). BN arguably violated Condition 23 on the Northern Lines merger by eliminating from its tariff a Milwaukee Road joint-line movement of coal, confirmed by its witness Avery (Tr. 7168-9); cf. Ex. H-112, p. 13. The addition of one railroad as competitor to BN for this traffic is amply justified by the record.

(4) Milwaukee Road Operations
May Immediately Commence
Under the Condition and the
Model Trackage Rights Contract

At the post-hearing conference herein, the parties were asked to address the question of whether the Commission should mandate the terms of trackage rights operations (if granted) or give the parties time to negotiate the terms of the arrangements (Tr. 8364). Milwaukee Road, from bitter experience well known to the Commission, suggests the former, using the model trackage-rights contract proffered as Ex. 9 to the Sub-22 application, is the only means available to the Commission to assure that trackage-rights operations in the public interest commence immediately upon consummation of the merger subject to the condition.

Milwaukee Road shall be ready to commence immediate operations. Its involved trackage shall be rehabilitated under a grant of $2.3 million from the State of South Dakota (Ex. H-236, p. 7; see Reorganization Court Order No. 200, in Appendix Volume, Appx. "S".) Its operations

plan is well thought out (Sub-22 Application, Ex. 10, C-13) and operations would be profitable (Sub-22 Application, Ex. A-15 (viii)). There is no criticism of record by BN, which was offered and waived cross-examination of the operations plan (Tr. 5143). Other than the equivocal testimony of BN's witness Michon discussed above, there is no claim of record that such operations will injure BN seriously.

BN opposition to the terms of the model trackage-rights contract (Ex. H-199) is unrelated to traffic volume (Larson, Tr. 7254) and more burdensome that other Milwaukee Road-BN trackage rights agreements (Tr. 7255-7). As C&NW's witness Hussey put it, "there isn't a railroad in the United States that could afford" the trackage-rights rate demanded by BN (Tr. 7963). The Commission must accept as fact that BN is utterly opposed to the proposed trackage-rights conditions and will freely use its ability to haggle over terms to prevent or postpone such operations as long as possible, even following consummation of the merger subject to them.

The Commission has faced just such problem in the past and mastered it through compulsory arbitration, <u>although at the cost of months lost in achieving such operations</u>. Following the L&N-Monon merger subject to a condition authorizing Milwaukee Road trackage-rights operations over L&N, consummated July 31, 1971, L&N simply rejected Milwaukee Road's form of trackage-rights contract and substituted its own; there followed an elaborate ritual, of L&N's insistence, of many months, during which "negotiations" over terms were pursued, ending finally in impasse. Since the trackage-rights condition contained a clause identical to that proposed here, allowing Commission determination of terms should the parties fail to agree, Commission jurisdiction was

invoked, a full-scale hearing convened, and following more months of evidence-taking and decisional process, the Judge finally set the terms, holding (Chicago, M., St. P. & P. R. Co. - Trackage Rights, 342 I.C.C. at 608):

> As a final matter, yet a matter of no small importance, there must be considered the question: When shall the Milwaukee trackage rights operations commence? * * * The expeditious implementation of the trackage rights condition nevertheless continues to elude realization. This inordinate delay, regardless of source, does not serve the public interest. To the contrary, it frustrates the public interest. The time for implementation of this condition is now; the trackage rights operations should commence forthwith. * * *It is concluded, accordingly, that trackage rights operations by Milwaukee over the L&N and K&IT * * *shall, in the public interest, commence no later than 30 days after the effective date of the Commission's order herein * * *

The Commission adopted the Judge's report by Decision and Order of January 8, 1973, and Milwaukee Road's operations commenced March 1, 1973 - fully 19 months following consummation of the merger subject to the condition! Even then, L&N brought an action to set aside the Commission's order, with motion for temporary restraining order, and took the District Court's declination to restrain to the Circuit Justice of the Supreme Court, in all of which it failed. Louisville & N. R. Co. v. United States, in 369 F. Supp. 621 (W.D. Ky., 1973). Therein, the Court noted (at p. 625):

> Retention of jurisdiction by the Commission [of trackage-rights terms] clearly demonstrates that it had the vision and foresight to perceive that certain insurmountable obstacles might arise between L&N and Milwaukee when they commenced their negotiations for the trackage rights.

There is manifestly no need whatever for the Commission to allow the possibility for such frustration of the public interest ever again to recur. That it may easily recur as a result of any trackage-rights

condition imposed on the Commission's approval of the proposed merger has been forecast by the expressed hostility of BN management to any such conditions, and by their witnesses' opposition to proffered terms for such rights, on this record. The Commission may easily resolve the problem in advance by directing that BN accept the proffered terms ad interim while litigating disputed terms before the Commission, thus permitting immediate commencement of trackage-rights operations in the public interest. In this, the Commission should note that the terms proffered are prima facie reasonable, in that they were approved by the Commission in trackage-rights operations between Milwaukee Road and Chicago & North Western (Beckman, Tr. 5139; Counsel Sippel, Tr. 5700-1, referring to F.D. 28657 and 28731 - approved by Decisions served August 25, 1978 and April 26, 1979, respectively; Hussey, Tr. 7958), parties which are far more equal in bargaining power than Milwaukee Road and BN.

In sum, the Commission, if it is to approve the merger of applicants, must find that imposition of Milwaukee Road Condition No. 6 on their merger is just and reasonable and in the public interest, in the exercise of its power to improve the condition of railroads affected by a merger so as to preserve and enhance intramodal competition.

C. Milwaukee Road Condition No. 11: Indemnification; No. 12, Reduction of Indemnity

Utterly opposed by applicants (Menk, Tr. 168), the concept of indemnification has been accepted and imposed by the Commission as a condition on an otherwise-approved merger. Chicago & N. W. Ry. Co. - Control, 347 I.C.C. 556, at 616-617 (1974): Pennsylvania R. Co. - Merger - New York Central R. Co., 327 I.C.C.475, at 561-563. This record demonstrates the need for indemnification to be imposed again.

The Condition reads:

> Monthly cash indemnification of Milwaukee Road traffic losses proved as a result of the Burlington Northern merger since 1970 and as a result of the BN/Frisco merger if approved, including absorption by BN of the cost of labor protection, if any, for Milwaukee Road employees furloughed as a result of traffic losses to Burlington Northern.

Milwaukee Road President Smith testified (Ex. H-132, p. 7):

> An exact form of indemnification, as well as the amount involved, should be determined by the Commission following its decision in the main case; but the importance of the issue should here be established. Indemnification in cash would merely equalize the cash drain resulting from revenue losses and employee protection. Positive cash flow is an essential component of the continuation of railroad operations; its reduction through diminution of revenues and the payment of furloughed employees under current labor contracts has a severe impact on the railroad's ability to operate.

Milwaukee Road witness Koudelka testified (Ex. H-194, p. 5):

> (8) There will be some mitigation of the "ripple effect" on some employees through the application of the aforementioned existing labor protection and other agreements; however, the cost of such protection, as stated above, would have to be borne by this railroad, unless conditions as requested by this railroad are imposed. * * *Accordingly, adequate protection for the Milwaukee Road's losses from employee protection that the Milwaukee must provide under the various existing above-referred-to labor agreements, must be seriously recognized in this proceeding.

Thus, there are two components of the proposed Condition: indemnification for traffic losses and for labor-protection payments incurred by Milwaukee Road should such losses cause labor-protection payments. As previously shown above, a 5.5% reduction in Milwaukee Road employment would be caused by the traffic diversion found by Milwaukee Road as resulting

from this merger, and "attrition" cannot be depended upon to offset payment of Milwaukee Road protection under its labor agreements (Ex. H-194, p. 3; Koudelka, Tr. 7052-3). Indeed, opportunity to avoid payment of protection by Milwaukee Road would be "thwarted" by this merger (Koudelka, Tr. 7054).

To be sure, the form the Condition takes at this time is necessarily general, and as President Smith testified, deliberately so pending the decision of the Commission in the main case. As a "merger post-audit," however, indemnification for traffic losses and labor protection incurred has a strong public-interest appeal, and may be enforced by the Commission through requiring special reports of applicants and those railroads it has found would be likely to incur traffic losses. Similarly, the offset of revenue gains from trackage-rights and other conditions granted may be accomodated in a reporting system, hence the coupling of Milwaukee Road Condition No. 12 with No. 11: "Thus there would be a positive incentive for the merged BN to fulfill the traffic conditions imposed. Commission monitoring of the two conditions would be expected under a reporting system" (Ex. H-132, p. 7).

D. Milwaukee Road Condition No. 13: Liquidated Damages for Condition Violations

The Condition reads simply:

> Require Burlington Northern to pay to Milwaukee Road $100,000 in liquidated damages for each violation of any merger condition.

This record not only reflects BN's past violations of merger conditions (Ex. H-112, p. 13); it also reflects BN's disingenuous, if not contrived, self-absolution of those violations (Ex. H-196; Avery, Tr. 7163-8, 7169-71).

The Commission itself found BN in violation of Condition 23 of the Northern Lines merger, notwithstanding lack of Milwaukee Road complaint, and issued its Decision to correct the situation, Great Northern Pac. - Merger - Great Northern, 333 I.C.C. 391 (1968), wherein Milwaukee Road had concurred in an erroneous routing guide and tariff, reading itself out of certain grain movements (id. at 392).

President Smith testified (Ex. H-132, p. 7):

> Condition No. 13 seeks to supplant the present method of litigation, including proof of damages, with stipulated liquidated damages for each BN violation of a merger condition. In our experience under the Northern Lines Merger conditions, frequent disputes concerning the issue of compliance arose after BN's behavior was noticed, and the issue of whether to litigate is weighed against the cost of litigation and the ability to prove damaged, i.e. loss of traffic revenues.

It is clear from the absence of Milwaukee Road complaint in the Commission's files and Mr. Smith's testimony that, to date, Milwaukee Road has found the cost of litigation and difficulty of proof outweighing the likelihood of success. Such calculation, while presently necessary, should have no place in determining whether a Commission-sanctioned merger has worked to the detriment of competing carriers, whether the beneficiary of the Commission's approval has abided by the conditions imposed. The Commission should remove this artificial burden through imposition of the Condition proposed.

E. Milwaukee Road Condition No. 14: Revision of Joint-Facility Agreements

Condition No. 14 reads:

> Require the Burlington Northern to allow the Milwaukee Road the right to allow other railroads to use, lease, sublease, or buy Milwaukee Road's rights in all joint facility agreements with Burlington Northern.

President Smith testified (Ex. H-132, p. 8):

> Condition No. 14 would simply require a normal "successors and assigns" clause in any present or future joint-facility agreement with BN, including any trackage rights condition imposed [as a result of this proceeding]. The lack of such a clause, frequently insisted upon by the grantor to preclude succession by a more powerful competitor, is frequently used by BN as an anti-competitive device, as shown by BN behavior in its refusal to allow C&NW to operate over the Milwaukee Road/BN paired trackage, between Newport, Minnesota, and St. Paul, thereby diminishing the scope of one of our Federal Railroad Administration 4-R Act rehabilitation programs.

Mr. Smith additionally testified (Tr. 5539-40):

> ***The same could be said of a trackage [rights] relief, such as the one referred to between Newport and St. Paul. This would enable us to gain some benefits from unfolding what's called the 401 process under the 4_R Act, where we presently are somewhat frustrated in achieving an agreement that's been reached by the Milwaukee and the North Western. * * *The term refers to Title 4 of the 4-R Act, and then particularly the process and the encouragement of the process to attempt to find pairs of communities that would lend themselves essentially to the market. And this is a process under sanction of the FRA.
>
> We have sought and have worked out a 401 project, if you will, with the North Western that happens to involve as one of the four communities involved Red Wing, Minnesota. The problem of the movements to and from is that we do not have the right to get the North Western on the railroad between Newport and St. Paul.
>
> Probably of a little more consequence we have been very active under Title 5 of the 4-R Act in seeking rehabilitation funding...[A] major assist to an earlier conclusion of our 505 effort would have been the lack of restriction on allowing another railroad to use the present Milwaukee-Burlington [r]ailroad between Newport and St. Paul.
>
> There is an impediment, we feel, between [sic.] additional funding, because [one of] the principle[s] of Title 5 funding is to gain a multiple use of public investment. * * *

BN's witness was firm: wherever the Commission orders trackage rights over BN, BN will insist upon a clause requiring its prior consent to any operations by a successor or assignee of the rights (Larson, Tr. 7267), even as a result of the Northern Lines merger (Tr. 7267-8); as the witness stated, BN is presently discussing with Milwaukee Road "as to just what the assignability really is" (Tr. 7268), based on a fear of "short line operations taking on one segment of a railroad" (Tr. 7268). Indeed, BN "would resist assignability less to any entity taking over the entire Milwaukee as an example" (Tr. 7268-9). The Judge brought out that relative bargaining power of BN and the desired trackage-rights operator is an element in negotiation (Tr. 7269). The witness, while making a distinction without a difference between trackage-rights operations and the Newport-St. Paul paired track agreement (if any difference, based on ownership; i.e. control) (Tr. 7271), admitted that BN refused its concurrence in C&NW's use of track, thus confirming President Smith's testimony above (Tr. 7271). Counsel's Ex. H-200 brought out that Milwaukee Road/BN trackage rights contracts have varying assignability provisions, notwithstanding the BN policy cited by the witness.

There is no doubt that the Commission has continuing jurisdiction over the reformation of trackage-rights agreements that it has approved. Chicago & N. W. Transp. Co. - Abandonment, 354 I.C.C. 205, at 208-211 (1978). But that decision did not reverse Delaware & H. R. Corp. Trackage Rights Agreement Modification, 290 I.C.C. 103 (1953), cited at page 210, which held that agreements entered ante the 1940 Transportation Act, which gave the Commission explicit jurisdiction over trackage rights agreements, were without Commission jurisdiction until their expiration by their own terms (ibid.). Many of Milwaukee Road's trackage rights

agreements with BN were entered long before 1940 (Ex. H-200), thus precluding Commission intervention to permit assignment to a successor of Milwaukee Road. As Milwaukee Road continues its reorganization and restructuring process, it is finding its efforts increasingly inhibited by BN's declinations to permit assignment, particularly that between Maple Valley and Seattle, WA, entered in 1906 (Tr. 7259) which Union Pacific may wish to purchase. Commission imposition of its jurisdiction over such agreements, whether or not entered ante 1940, as a condition of this merger would be of material assistance to such reorganization and restructuring efforts. It is submitted that such imposition of jurisdiction would merely require BN to be reasonable, and would protect the public interest.

F. Milwaukee Road Condition No. 22: Imposition of Reformed "DT&I" Conditions

It was earlier noted that applicants' concession on imposition of the "DT&I" conditions on their merger (Tr. 809) is highly questionable due to the narrow interpretations BN has given to their application (Tr. 244-247, 720-1, 724, 728, 733-4, 736, 738) which clearly violate the spirit, if not the letter, of the classic form of the Condition (Tolan, Tr. 3242-3). BN has, in fact, in its stipulation of settlement with Missouri Pacific, revised the form towards liberality (Tr. 790). President Smith testified (Ex. H-132, p. 8):

> Condition No. 22 seeks to reform the so-called "DT&I conditions" to eliminate the frequent evasions of that set of conditions, such as new traffic, new industries, new rates, etc. not moving prior to merger. BN has frequently employed such evasion in responding to protests that it was violating Conditions No. 1 through 5 on the Northern Lines Merger, as shall be testified by Mr. Brennan.

Milwaukee Road witness Brennan testified (Ex. H-112, p. 13):

> * * *Milwaukee Road's experience is that the historic form is ineffective to prevent losses of traffic due to BN evasions and even outright violations of its merger conditions of the past. [examples omitted] The reformed conditions are intended, with our Condition No. 13, to prevent further evasions and violations of "DT&I" conditions on grounds that new traffic, new stations, or new rates are involved.

BN's counter to this, Ex. H-196 at pp. 5-9, is highly evasive. Its story as to how Milwaukee Road lost two industries at Fargo, ND (p. 6) is qualified by the fact that Milwaukee Road was excluded from the relocation process (Avery, Tr. 7165);[38] its story of how Milwaukee Road lost participation in coal traffic (p. 7) was blandly tied to the non-existence of the station prior to merger despite the coverage of the territory including the area of the new station by BN tariff (Avery, Tr. 7168); its story explaining why Milwaukee Road was excluded from bulk fly ash movements was confined to the "very unique" (p. 7) or "special case" (Tr. 7170) characteristics of the movement, which characteristics were confined to "profitability" and coordination with a connecting trucker (Tr. 7170-1). The Commission must note that all these BN actions are unilateral, involving BN's subjective judgements, ipse dixit that no violations occurred.

The Commission is aware that the "DT&I" conditions in their classic form have not worked equity. In reviewing one such application, the Court in N.Y. N.H. & H.R. Co., Bondholders' Committee v. United States, 289 F. Supp. 418 (S.D. N.Y., 1968) observed "they [the conditions] do not speak to the quality of service afforded" and "they give no protection as

37/ Milwaukee Road's Fargo line is now the subject of an abandonment proceeding, Docket No. AB-7, (Sub-No. 68F).

to schedules affording effective connections...or many other factors important to maintaining service on a competitive basis" (at p. 447). Other complainants have been dismissed, Kansas City Southern Ry. Co. v. United States, 288 F. Supp. 742, 745-748 (W.D. Mo., 1968), while yet others succeeded following litigation before the Commission (cf. citations at p. 747 of 288 F. Supp.).

It will be recalled from above that applicants promise nothing regarding maintaining the quality of interchange service at Kansas City (Able, Tr. 2046-50). Neither do they commit themselves to any firm interpretation of the classic form of "DT&I" conditions (Tr. 720-1, 733-4). Again, it is for the Commission to terminate controversy where possible by reforming its condition towards certitude. Milwaukee Road has proffered such a reform in its Condition No. 22.

G. Cost of Conditions Requested; Time Limit; Stipulations

The parties were requested at post-hearing conference to give their estimate of the cost to BN of the conditions requested, whether proffered conditions should have time limitations, and whether the stipulations reached are in the public interest (Tr. 8364).

Milwaukee Road's Condition No. 6, the Sub-22 Application for trackage rights into BN's exclusively-served coal fields, is the only Milwaukee Road condition costing BN anything, as shown by Milwaukee Road witness Brennan's Commission-ordered traffic study therein (Application, Ex. A-15; Ex. H-113). Milwaukee Road's other conditions are all defensive and are insusceptible to redaction as to cost (President Smith, Tr. 5539), particularly following withdrawal of Condition No. 5, use of the BN yard.

None of Milwaukee Road's proffered conditions on the proposed merger permits a time limitation. President Smith testified (Ex. H-132, pp. 8-9) that a reorganized, restructured Milwaukee Road looks forward to continuing its competitive services "successfully in the public interest for many years to come" and all the proffered Conditions are necessary to that end. Commission monitoring of the effects of the merger, as suggested through Conditions No. 11 and 12, should be pursued without any "sunset" provision since applicants' "synergistic effect" of their merger will no doubt take years to work its impacts. The illustration of Milwaukee Road's BN Inclusion proceedings, where a 5-year time limit nevertheless has permitted proceedings approaching the 10th year following merger, should indicate that artificial time limits may not work, and may prevent corrective action even when such action is in the public interest. Of course, former Section 5(10) of the Act, giving the Commission power to make supplemental orders following its approval of the merger, has no termination limitation.

Other than the Stipulation between applicants and Southern Railway discussed above, Milwaukee Road has no observation to make respecting the public interest in the Commission's approval of such stipulations. As to that Stipulation, Milwaukee Road asserts that it may be inconsistent with the public interest for the reasons stated, viz. that it would tend to defeat the public interest as defined and applied in the L&N-Monon case granting Milwaukee Road trackage rights to Louisville to serve as a "Chicago connection" for southeastern systems connecting with it at Louisville, by encouraging applicants and Southern to by-pass the Louisville gateway. Milwaukee Road therefore suggests that the Commission carefully examine that Stipulation in the light of the public interest in Milwaukee Road connecting service at Louisville.

IV. CONCLUSION

> I assert that Milwaukee Road is not a system whose usefulness has ceased to exist, as suggested by BN's Chairman Menk on this record. Milwaukee Road has a distinct utility to the public interest as repeatedly found by the Commission in the Northern Lines Merger case, and with these [conditions] and the trackage-rights conditions assisting the reorganization of the property, and other measures not related to this case, Milwaukee Road's competitive services may continue successfully in the public interest for many years to come.
>
> If this merger is to be approved before Milwaukee Road is able to reorganize, the Commission must provide for its continuation in the public interest as a BN competitor by imposing the conditions [requested] * * * (Testimony of Milwaukee Road President Smith, Ex. H-132, p. 9.)

Milwaukee Road has shown how applicants' proposal would do it severe damage, probably causing it to leave the Chicago-Kansas City market despite its cooperative efforts with Rock Island in coordinating services in that market. Milwaukee Road therefore urges denial of the application. If, however, the application is to be approved as consistent with the public interest, Milwaukee Road has shown that its conditions on the merger are just and reasonable, in the public interest, and should be imposed in such approval.

Wherefore, the Commission is requested to make the following Findings.

V. REQUESTED FINDINGS

1. That the application of Burlington Northern Inc. and St. Louis-San Francisco Railway for authority to merge has not been shown to be consistent with the public interest and the National Transportation Policy, and is denied.

2. That the proceedings in F.D. 28583, et al., are discontinued.

In the alternative:

1. That the application of Burlington Northern Inc. and St. Louis-San Francisco Railway for authority to merge their properties, franchises, etc. is found to be consistent with the public interest, but only on their acceptance of the Conditions requested by the Trustee of the properties of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, specifically his Conditions No. 6, 11, 12, 13, 14 and 22, which conditions are hereby found to be just and reasonable and in the public interest; and applicants' consummation of their merger subject to those Conditions shall constitute their irrevocable assent thereto.

2. That the Application of Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, in F.D. 28583 (Sub-No. 22) is found to be consistent with the public interest and is approved and authorized; and that no significant impact on the quality of the human environment or the use of energy resources will result therefrom.

3. That the Commission shall retain jurisdiction of these proceedings to assure their speedy implementation in the public interest.

4. That applicant Burlington Northern Inc. following consummation of the authority granted it in F.D. 28583 (Sub-No. 1) shall grant immediate access to its trackage as requested in F.D. 28583 (Sub-No. 22) under the terms and conditions proposed by Applicant in said Sub-No. 22 application,

Exhibit 9, subject only to later proceedings for determination of final terms and conditions should Burlington Northern Inc. request such proceedings within six (6) months from the date of consummation of the authority granted it in F.D. 28583 (Sub-No. 1): and the terms and conditions proposed by Applicant in said Sub-No. 22 application, Exhibit 9, are found to be just and reasonable and in the public interest.

Respectfully submitted,

RICHARD B. OGILVIE, TRUSTEE
OF THE PROPERTY OF CHICAGO, MILWAUKEE,
ST. PAUL AND PACIFIC RAILROAD COMPANY

By his Attorneys:

Thomas H. Ploss
William C. Sippel
888 Union Station
Chicago, Illinois 60606

312/648-3844

Sarah F. Holzsweig
1050 17th Street, N.W.
Washington, D.C. 20036

Of Counsel:

Isham, Lincoln & Beale
One First National Plaza
Suite 4200
Chicago, Illinois 60603

(312) 558-7500

CERTIFICATE OF SERVICE

I certify that on the 10th day of August, 1979, I served a copy of the foregoing Opening Brief of the Trustee ("Milwaukee Road") upon all parties of record herein, with 20 copies to the Interstate Commerce Commission, by depositing each copy, contained in an envelope plainly addressed to each such party, first-class mail prepaid, in a receiving station of the United States Postal Service.

THOMAS H. PLOSS

ADM MILLING CO
NORTH KANSAS CITY, MISSOURI
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

TOTAL: 311

DATED: April 18, 1976

ACFX LEASED PD CARS (68)

44502
44510
44511
44512
44514
44515
44516
44517
44520
44521
44525
44527
44528
44529
44531
44532
44533
44534
44536
44538
44540
44543
44545
44546
44548
44549
44550
44551
44553
44554
44555
44556
44558
44562
44566
44568
44569
44570
44574
44575
44576
44577
44578
56665 *
56666 *
56667 *
56668 *
56669
56670 *
56671
56672
56673
56674
56675
56676
56677
56678
56679 *
56680
56681
56682 *
56683
56684
56685
56686
56687
56688
56689

GACX LEASED (57)

43186
43411
43417 *
43418 *
43420
43423
43425 *
43536
43537 *
43556 *
43568
43740
43742 *
43834
43836
44187 *
44189 *
44944 *
44945 *
46170 *
46773
46775
46784 *
46791
46793
46800
46805
46807
46809
46810
46811
46814 *
46818 *
46819 *
46820
46821
46822
46823
46826
46827
46828
46830 *
46831
46836
46838
47171 *
47174
47177 *
47179 *

ATSF (30)

310000
310001
310002
310003
310004
310024
310028
310029
310039
310040
310041
310121
310125
310126
310127
310128
310129
310151
310156
310157
310171
310174
310196
310212
310213
310247
310257
310310
310315
310318

BN (21)

400563
400597
400642
400659
400699 *
400707
400744
400748
400827
400833
400921
401023
401269
401276
401330
401335
401393
401400
401403
401405
401426

CBQ (21)

87066
87152
87153
87154
87156
87208
87222
87244
87250
87326
87332
87405
87432
87447
87515
87516
87523
87526
87552
87724
87732

ADM MILLING CO
NORTH KANSAS CITY, MISSOURI
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

TOTAL: 311

DATED: April 18, 197.

IC (1)

59048

ICG GACX (4)

42403
42404
43448
43449

KCS (9)

5102
5103
5106
5108
5129
5131
5139
5196 *
5199 *

MKT (17)

9032
9102 (J)
9104 (J)
9107 (J)
9110 (J)
9112 (J)
9113 (J)
9114 (J)
9117 (J)
9118 (J)
9120 (J)
9122 (J)
9125 (J)
9126 (J)
9130 (J)
9131 (J)
9135 (J)

BKTY (7)

1052
1053
1211 (J)
1217 (J)
1223 (J)
1224 (J)
1226 (J)

MP - TP (1)

720215

MOP (12)

720017
720018
720056
720063
720064
720065
720067
720068
720070
720071
720087
720089

NKP (15)

513
542
558
577
585
588
599
620
622
640
648
649
659
690
694 *

NOW (20)

71622
71626
71683
71684
200522
200621
200623
200627
200652
200691
200692
341102
341103
341153
341165
341166
341169
341197
344497
345021

SLSF (20)

81513
81516
81518
81528
81532
81536
81554
81557
81563
81568
81569
81575
81591
81595
81596
81597
81598
81599
81600
81601

WAB (8)

41101
41109
41161
41162
41163
41164
41167
41168

(J) Jumbo Cars
(*) Subleased or temperory use at other mill locations.

ADM MILLING CO
NORTH KANSAS CITY, MISSOURI
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

TOTAL: 311

DATED: April 18, 197

IC (1)

59048

ICG GACX (4)

42403
42404
43448
43449

KCS (9)

5102
5103
5106
5108
5129
5131
5139
5196 *
5199 *

MKT (17)

9032
9102 (J)
9104 (J)
9107 (J)
9110 (J)
9112 (J)
9113 (J)
9114 (J)
9117 (J)
9118 (J)
9120 (J)
9122 (J)
9125 (J)
9126 (J)
9130 (J)
9131 (J)
9135 (J)

BKTY (7)

1052
1053
1211 (J)
1217 (J)
1223 (J)
1224 (J)
1226 (J)

MP - TP (1)

720215

MOP (12)

720017
720018
720056
720063
720064
720065
720067
720068
720070
720071
720087
720089

NKP (15)

513
542
558
577
585
586
599
620
622
640
648
649
659
690
694 *

NSW (20)

71622
71626
71683
71684
200522
200621
200623
200627
200652
200691
200692
341102
341103

341153
341165
341166
341169
341197
344497
345021

SLSF (20)

81513
81516
81518
81528
81532
81536
81554
81557
81563
81568
81569
81575
81591
81595
81596
81597
81598
81599
81600
81601

WAB (8)

41101
41109
41161
41162
41163
41164
41167
41168

(J) Jumbo Cars
(*) Subleased or temperory use at other mill locations.

Page 2

TOTAL: 4 Hoppers
40 Boxcars
276 Airslides

ADM MILLING CO
NOKOMIS AND ATKINSON MILLS
MINNEAPOLIS, MINNESOTA
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

DATED: April 18, 1976

MILW (55)

97000
97001
97003
97005
97034
97036
97039
97057
97078
97079
97080
97082
97089
97090
97122
97123
97124
97125
97126
97127
97130
97132
97133
97134
97135
97139
97143
97144
97152
97153
97154
97155
97156
97158
97159
97181
97188
97191
99873
99880
99888
99889
99890
99892
99897
99910
99919
99921
99932
99962
99964
99965
99973
99975
99979

MNS (4)

(Hoppers)

48581
48582
48585
48586

PRR (12)

260447
260448
260453
260454
260456
261409
261412
261426
261427
261429
261430
261432

PC (14)

878282
878364
878731
878732
878733
878734
878736
878737
878738
878747
878815
878832
878848
878874

SOO GACX (4)

43080
43081
43356
44394

SOOLINE (4)

69218
69219
69223
69251

IC (4)

59058
59144
59145
59173

COOCH MILL AND ELEVATOR
A DIVISION OF ADM MILLING CO
NORTH KANSAS CITY, MISSOURI
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

TOTAL: 3

DATED: April 18, 1976

GACX LEASED (3)

43417
43418
46830

TABOR MILLING COMPANY
A DIVISION OF ADM MILLING CO
NORTH KANSAS CITY, MISSOURI
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

TOTAL: 30

DATED: April 18, 1976

GACX LEASED (10)

42288
42290
43914
44048
46858
46859
46860
46866
46867
46873

BKTY (1)

1219

BN (2)

401333
401419

IC (4)

59045
59065
59071
59081

KCS (3)

5112
5117
5135

LOA (1)

11021

LN (2)

38883
38884

MKT (2)

9016
9017

SLSF (2)

81509
81552

PC (3)

897028
897030
897033

ACFX (1)

56679 *

*- Tem From NKC-ADM

INLAND MILLS
A DIVISION OF ADM MILLING CO
DES MOINES, IOWA
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

TOTAL: 2 Boxcars
117 Airslides

DATED: April 18, 1976

GACX LEASED (56)

42056
42057
42058
42059
42260
42261
42264
42267
42268
42269
42270
42271
42272
42273
42274
42276
42277
42278
42279
42281
42282
42283
43018
43421
43532
43539
44030
44255
44256
44257
44258
44259
44260
44261
44262
44263
44264
44265
44266
44267
44268
44269
45814
45815
45816
45817
45818
45829
45830
45831
45832
45834
45835
45836
45837
45838

BN (2)

400674
401024

B&O (2)

830062
830171

CBQ (7)

87349
87350
87418
87509
87742
87743
87744

CNW (10)

69675
69677
69679
76815
76817
76819
76823
76837
76839
76903

CGW (4)

4
25
32
33

CGO (6)

2268
2269
2365
2572
2588
2593

DANX (2)

7016
7019

IC (5)

59021
59023
79090
79094
79095

ICG (1)

780018

NKP (3)

516
542
575

N&W (8)

71680
71685
71686
71687
71695
71696
200512
341194

PC (7)

878260
878279
878322
878344
878709
878710
878711

PRR (4)

260446
261393
261395
261411

WAB (2)

41195
44254

GOOCH MILL AND ELEVATOR COMPANY
A DIVISION OF ADM MILLING CO
LINCOLN, NEBRASKA
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

TOTAL: 70 Airslides
2 boxcars

DATED: April 18, 1976

BN (8)

400607
400661
400815
400836
400940
401008
401034
401223

CBQ (33)

87335
87336
87337
87342
87348
87351
87413
87414
87416
87417
87422
87433
87442
87465
87466
87501
87521
87525
87529
87536
87557
87558
87579
87581
87595
87717
87722
87727
87728
87729
87730
87731
87733

GN (2)

71912
71914

IC (2)

59135
43451 (GACX)

ICG (2)

780093
780174

MOP (6)

720025
720062
720114
720128
721004
721098

RI (5)

8847
8849
8850
8864
8899

TP (1)

720178

GACX LEASED (4)

42254
42255
42257
42258

BGO (7)

830072
830076
619022
619094
619099
832000
832011

BOXCARS (2)

DANX 7004

CBQ 23000

TOTAL: 30

FUHRER-FORD MILLING COMPANY
A DIVISION OF ADM MILLING CO
LEASED AND RAILROAD ASSIGNED
AIRSLIDE FLOUR CARS

(Mt. Vernon, Indiana)

DATED: April 18, 1976

GACX LEASED CARS (15)

43426
43428
43535
45649
45819
45820
45821
45822
45823
45824
45825
45826
45827
45828
46829

LN GACY (4)

43053
44649
44660
44662

LN (4)

202930
202974
202988
202989

KANSAS CITY CARS IN TEMPORARY SERVICE:

BN 400699 ✓

KCS 5196
KCS 5199

NKP 694

NW 341197

GACX 43843
GACX 44187