TESTIMONY

by
Anne K. Bingaman
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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INTRODUCTION

Good morning, I am Anne Bingaman, Assistant Attorney General in charge of the Antitrust Division. I'd like to take just a few moments to talk about the enormous importance of this case. Then I will turn the presentation over to Roger Fones, who will discuss our reasons for opposing the merger in greater detail and answer any questions the Board may have.

The proposed merger of UP and SP is unlike any other merger ever considered by this Board or its predecessor -- it is larger, involves more parallel lines, would affect competition in many more markets, and involves a proposed remedy that is of unprecedented scope. Let me be very clear about this -- the Applicants here are asking the Board to do something that is extremely radical -- allow the most anticompetitive rail merger ever proposed. As we said in our brief, this merger is one of the largest horizontal mergers ever proposed in such a concentrated industry. There is no argument about the proper product market here -- rail transportation. And no one is going to build another railroad to serve these markets. Approval of this merger would result in a monopoly in many markets and a rail duopoly throughout the West -- forever.

In addition, the Applicants ask the Board to approve a trackage rights agreement covering thousands of miles of the UP/SP system -- an arrangement that is without precedent in the industry, whose effectiveness is highly uncertain, and that does not even cover all of the competitive problems. Finally, the Applicants ask the Board to adopt a novel rule of law -- that this anticompetitive transaction can be justified by the financial condition of SP -- a company that is admittedly not failing, and whose assets will not leave the industry absent the merger.

Recognizing the widespread anticompetitive impact that this merger would have in this crucial industry, the Department has taken an active role in this proceeding, and we have devoted significant resources to this case. After reviewing all of the evidence, we believe that the public interest dictates that the merger application must be denied. Denial of the application would restore competition immediately and allow SP to get on with the business of strengthening itself or of coming up with an alternative transaction that does not raise competitive concerns. If the Board does decide to approve the merger, it should be conditioned on divestiture of the lines we have identified, and these divestitures must be to a party other than BNSF - nothing less could possibly protect competition. By far the better course is to simply deny the Application.

This is not a position that the Department has come to lightly. Of the many rail mergers over the last twenty years, the Department has opposed only two outright, both of which were disapproved by the ICC. We have carefully examined the competitive impacts of the proposed UP/SP merger, and we are forced to conclude that the Applicants have not met their public interest burden and that the merger must be disapproved.

Thank you for your attention, I will now turn the podium over to Roger Fones for the remainder of our presentation.