IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF	)	
	)	
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,	)	In Proceedings for the Reorganization of a Railroad
Debtor.	)	
	)	NO. 77 B 8999

REPLY MEMORANDUM IN SUPPORT OF SORE'S MOTION
FOR LEAVE TO INTERVENE

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter the "Milwaukee") is the sixth largest U.S. rail system and has the longest operating mainline in the country. Approximately forty percent (40%) of the Milwaukee system is west of St. Paul, Minnesota. Supplemental Affidavit of J. Fred Simpson, filed herewith, (hereinafter "Supplemental Simpson Affidavit"), at ¶ 13.

The Milwaukee's western lines employ approximately 3,000 workers and handle millions of tons of traffic annually which generates revenue of approximately $166,000,000. The Milwaukee pays approximately $2,000,000 a year in state and local taxes in Washington, Oregon, Montana, Idaho, North Dakota and South Dakota. Supplemental Simpson Affidavit at ¶ 13.

Any substantial abandonment of the Milwaukee's western lines would have an obviously devastating impact on its employees, on the thousands of shippers and their employees who are served by no other railroad and on the millions of citizens of the many towns throughout the northern tier states that are economically dependent on the Milwaukee.

SORE, an association of Milwaukee employees who work on the Milwaukee's western lines, seeks permission to intervene in these proceedings so that it can represent the interests of its member employees in protecting their jobs and to propose a reorganization that would preserve service on the Milwaukee's western lines.[1]

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[1] A statement of support for SORE's motion for permission to intervene has been filed by the State of Montana. According to counsel, one will also be filed by the railway Laobr Executives' Association, an intervenor which represents most of the national labor organizations that have bargaining agreements with Milwaukee.

As set forth in the Affidavit of J. Fred Simpson, dated February 8, 1979, (hereinafter "Simpson Affidavit") at ¶ 18.

> SORE recognizes that the Milwaukee's lines and equipment, including the lines and equipmment in the West, are in a deteriorated condition and that the Milwaukee system has not earned sufficient revenues to cover overhead nor produce a profit for a number of years. SORE does not agree, however, that the present deteriorated condition of the lines west of the Twin Cities is a result of any present inability of those lines to be rehabilitated and operated as a profitable railroad.

SORE asks this Court for an opportunity[2] to prove that the Milwaukee's western lines can be reorganized as a profitable independent railroad.

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[2] Objectors' suggestion of the Trustee and the Indenture Trustees (hereinafter "Objectors") that SORE can be heard before the ICC, and might perhaps be permitted to submit occasional written comments to the Court in these proceedings, apparently on occasions to be selected by the Trustee, falls far short of the type of participation that is essential if SORE's interests are to be effectively represented. As explained in detail in the memorandum in support of SORE's pending motion for a special notice order, one of SORE's principal concerns is that the Milwaukee's level of service, competitive position, and available physical assets on its western lines be preserved and maintained during the reorganization period so that the option, now available, of reorganizing those lines into a separate operating company remains available during the lengthy period of time that must necessarily elapse before a final plan is approved. Although it is true that the initial consideration of alternative plans will occur in the ICC proceedings, where SORE certainly does intend to be heard, the most pressing need at present is to ensure that the situation on the railroad's western lines is sufficiently stabilized and protected in the interim to assure that the ICC will have something left to reorganize.

It is absolutely necessary that SORE be permitted to participate in these proceedings, where critical choices will be presented long before the ICC proceedings begin in earnest, in order to properly represent its members and to preserve the reorganization option they seek to propose.

SORE will cooperate fully with the Trustee to preserve, and if possible, to enhance the assets and property of the Milwaukee. Indeed, SORE believes that a succuessful reorganization of the Milwaukee's western lines into a profitable independent railroad will substantially enhance the viability of the remaining portions of the Milwaukee system because SORE assumes the new company will: (1) pay full value for what it acquires, and (2) maintain a close and mutually beneficial economic relationship with the remaining part of the Milwaukee system.

The factual and economic basis for SORE's belief that the Milwaukee's western lines can be reorganized as a profitable independent railroad is outlined in the Simpson Affidavit at ¶ 19 and in the Supplemental Simpson Affidaivt Part III, at ¶¶ 29-35.

SORE's Reply Memorandum in Support of SORE's Motion for Special Notice on Certain Matters, filed herewith, makes it clear that SORE does not intend to interfere in any way with the Trustee's efforts to manage successfully the existing system.

If, as the Trustee contends, the Milwaukee's western lines are not economically viable they will undoubtedly be liquidated albeit at great cost to the Milwaukee's western employees and shippers and to the communities it serves.

If, however, the western lines can be reorganized as an independent private railroad, then liquidation would be a gross national mistake as well as a tragedy because a multi-billion dollar national asset would have been needlessly lost, with serious adverse long-range effects on the country's domestic economy, international balance

of payments and attempts to obtain and economically distribute the sum of the coal, oil and gas that are crucial to the national standard of living. See Simpson Supplemental Affidavit at ¶¶ 18-19. Simpson Affidavit at ¶ 19.

Given the magnitude of the public interest in this matter, it is scarcely conceivable that the very existence of the Milwaukee's western lines could be determined in a proceeding in which the only active participants other than the Trustee have a clear and overwhelming self-interest in liquidation.[3]

Nevertheless, unless SORE is permitted to intervene and participate fully in these proceedings that is precisely what will occur; and that is the context in which the opposition to SORE's intervention should be examined.

The Trustee and the four large banks that have intervened in these proceedings as Indenture Trustees (hereinafter "Objectors") make four assertions against SORE's intervention. They argue that (1) the Court has not been provided with sufficient information about SORE to permit intervention, (2) SORE's members' interest are adequately represented by the national unions that have previously intervened, (3) SORE's willingness to consider, if necessary, some

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3 The Milwaukee Road was placed in reorganization in December 1977 at the request of its owners. None of the creditors represented here opposed the petition. Both groups would gain enormously from a liquidation of the Milwaukee. See the Simpson Affidavit at ¶¶ 8, Exhibit A to that Affidavit, a January 9, 1979 Wall Street Journal article reporting recent "heavy trading" in the stock of the Chicago Milwaukee Corp., debtor's parent holding company, and reporting estimates that a liquidation would yield stockholders an equity of approximately $160 per share on shares purchased for approximately $10 per share.

ownership role in a reorganized western line creates an unacceptable conflict of interest, and (4) SORE's intervention would cause unacceptable delays, complexities and disruptions.

For the reasons explained below, these arguments are specious. SORE's motion for permission to become a party to these proceedings is not opposed for any persuasive legal reason, but rather because SORE seeks a genuine reorganization of the Milwaukee's western lines that is different in important respects from the approach favored by the Trustee and that conflicts with the liquidation bias of the railroad's shareholders and creditors.

Although keeping SORE out of these proceedings is in the economic interest of the Milwaukee's shareholders and creditors, and may simplify the Trustee's efforts to win acceptance for his proposals, it makes no sense for the Court to cut itself off from at least hearing from the only group with a responsible alternative for a reorganization that would preserve service on the Milwaukee's western lines. Whatever the Court's final decision in these proceedings, there is no good reason not to consider <u>all</u> constructive alternatives.

ARGUMENT

I.

SORE'S MOTION FOR LEAVE TO INTERVENE DISCLOSES ALL FACTS NECESSARY TO DEMONSTRATE THAT THE GROUPS' MEMBERS ARE "INTERESTED PERSONS" WITHIN THE MEANING OF RULE 8-210(c)

Objectors contend that SORE's motion for permission to intervene cannot be evaluated without a wide range of factual information about SORE. Objectors contend, for example, that SORE must state Mr. Simpson's rate of compensation, must identify contributors to the fund SORE has created to finance its participation in these proceedings, and state the amounts of their contributions, and must identify all non-union employees that belong to SORE.

Such requests, and the many others that accompanied them, are not calculated to elicit facts that are germane to an evaluation of SORE's motion for permission to intervene. It is incontestable that SORE's members have the requisite stake in the future of the Milwaukee to be treated as "interested persons" entitled to seek permissive intervention in these proceedings.[4]

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[4] SORE's moving papers demonstrate, by sworn and uncontroverted affidavit, that the group's members are employees that work on the Milwaukee's western lines, that these employees are interested in these proceedings because they seek to save their jobs, and that these employees have authorized SORE to represent their interests by intervening in these proceedings. It is also uncontroverted that SORE's members seek to submit a proposal for the re-vitalization and continued operation of their portion of the Milwaukee as a profitable and independent railroad, and that SORE's consultants have been at work for more than six months studying the viability of the western lines for that purpose. SORE's members have an immediate and, to them, critically important economic stake in the outcome of these proceedings.

The Trustee's suggestion the SORE "may be influenced by shippers or other contributors who have different interests and are already protected by the intervening states and the Interstate Commerce Commission" is baseless. SORE's membership consists only of present Milwaukee employees on the western lines, and some persons who were such employees, and would be still, but for recent reductions in force imposed by the Trustee. SORE's actions, positions, and decisions are completely controlled by, and solely represent the interests of, its members. See the Affidavit of J. Fred Simpson, filed herewith, ¶¶ 2-7.

Indeed, the banks' suggestion that SORE need not intervene as a party here because the group can appear in ICC proceedings likely in the future (Indenture Trustees' Memo, at 3-4, n.) necessarily concedes that SORE is an "interested person" with a sufficient stake in these proceedings to properly seek permissive intervention under Rule 8-210(c). As with these proceedings, only "interested" persons can appear in the ICC hearings that will be held to formulate a reorganization plan 11 U.S.C. § 205(d).

The banks sanctimonious description of SORE as a "narrow pressure group," is simply not true. Far from being a "narrow" interest, SORE represents the interests of hundreds of employees, many of whom are third or fourth generation Milwaukee employees with a fierce loyalty to the company, from a broad geographic area encompassing many of the western states. There is no requirement in Rule 8-210(c) that only coast-to-coast institutions can qualify as "interested persons" who can be permitted to intervene. Although SORE's members' need to protect their jobs many not seem significant to the giant banks serving as Indenture Trustees, these employees' stake in their jobs is vitally important to them and more than adequate to satisfy the "interest" requirement of Rule 8-210(c).

The discovery demanded by objectors be denied because it would unreasonably delay resolution of the intervention issue and would put SORE to unwarranted expense for no relevant reason.[5]

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[5] The only discernable reason for objectors' keen interest in learning the identities of: (1) Milwaukee employees that do not have union protection against sudden elimination of their jobs, and (2) SORE's contributors, and the amounts contributed, is to visit reprisals and retaliation upon unprotected member employees and vulnerable sympathetic shippers in order to collaterally chill support for SORE's activities among its members and the railroad's customers.

II.

SORE SHOULD BE PERMITTED TO REPRESENT ITS MEMBERS' DIRECT, SUBSTANTIAL AND WHOLEHEARTED INTEREST IN THE FATE OF THE MILWAUKEE'S WESTERN LINES

The Trustee and banks simply assert that since most of SORE's members are also members of the intervenor national unions, and since those unions are the duly certified representatives of their member employees under the provisions of the Railway Labor Act with respect to issues of wages, hours, and working conditions, it follows that the interests SORE seeks to represent will be adequately represented by the intervenor unions. If SORE were required to make a showing on the "adequacy of representation" issue of the sort required by Rule 24(a), which it is not,[6] SORE's application plainly demonstrates that neither of its two specific interests in these proceedings is adequately represented by any of the present parties.

SORE's express interest in formulating and presenting an alternative reorganization plan is not even arguably represented, at all, by any other party. The national labor organizations are not constituted to develop or submit plans for the reorganization of any particular railroad, or any other business, and insofar as we are aware have no intention of doing so in these proceedings.[7]

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6 F.R.C.P. Rule 24(a)'s Provision That an Applicant May Not Intervene as of Right if "the applicant's interest is adequately represented by existing parties" Has No Counterpart in the Requirements for Permissive Intervention Under Either F. R. C. P. Rule 24(b) or 11 U.S.C. Rule 8-210(c). See, e.g., 3B Moore's Federal Practice ¶ 24.10[2] at 24-357 (1977).

7 Indeed, SORE's counsel has been advised by counsel for the Railway Labor Executives Association ("RLEA") that the member unions represented by the RLEA do not intend to prepare or submit an alternative reorganization plan and that, in order to ensure that a full range of options and views are presented in these proceedings, RLEA welcomes and supports SORE's motion for permissive intervention. This circumstance alone suffices to demonstrate that SORE's interest in formulating and submitting an alternative reorganization plan will not be represented at all, much less "adequately," by any of the present parties to these proceedings.

Second, although objectors assert that SORE's interest in helping its member employees keep their jobs will be adequately represented by the intervenor unions, SORE easily meets the standard of proof prescribed by the leading cases for determining whether a party's interests are being "adequately represented" by another. According to the Supreme Court in Trbovich v. United Mine Workers, 404 U.S. 528 (1972).[8]

> The requirement of the Rule [F.R.C.P. Rule 24(a)(2)] is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

404 U.S. at 538, n.10 (citation omitted) (emphasis added).

SORE's showing in support of its motion for permission to intervene clearly satisfies that "minimal burden." Compare, Natural

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8 In Trbovich a union member filed a complaint with the Secretary of Labor requesting that the Secretary bring suit to set aside the election of the union's officers. The Secretary found the complaint well-founded, and brought suit to set aside the election and thus vindicate the union member's rights. The union member then sought to intervene in the suit. In spite of the fact that the Secretary had a direct interest in vindication of the union member's rights, the Supreme Court held that the union member had a right to intervene to present evidence in support of the Secretary's suit and to suggest the terms on which the remedy (a new election) should be fashioned.

In response to the Secretary's argument that he adequately represented the union member's interests, the Court held that the Secretary had two interests, (1) to represent the union member as "his lawyer," and (2) to represent the broader public interest in free union elections. See 404 U.S. at 538-39. The undivided and more narrow focus of the union member's specific interest required that he be allowed to intervene.

Countless cases have permitted intervention under Rule 24(a)(2) on the basis of truly "minimal" showings on the "adequacy of representation" issue. Professor Moore concludes from the applicable precedents that inadequacy of representation under Rule 24(a)(2) is sufficiently shown whenever the applicant decides that his interests require the economic cost of intervention. See 3B Moore's Federal Practice ¶ 24.09-1[4] at 24-316 (1977), citing cases.

Resources Defense Council v. Costle, 561 F.2d 904, 911-13 (D.C. Cir. 1977).

SORE speaks directly for its members in an immediate and responsive way that the industry-wide national labor organizations cannot. The memberships of each of the national unions consist not only of all of the employees of the Milwaukee Road throughout the nation, but also encompass the employees of all competing rail carriers. Indeed, many of the intervenor unions also represent employees in industries other than the railroads.[9] SORE, on the other hand, represents a cross section of Milwaukee employees in various classes and crafts from one specific geographic area.

In addition, the nature of the interests represented by the national unions differ from the interests represented by SORE. The national unions represent their member employees in a wide range of matters pertaining to working conditions, wages and grievance procedures and are primarily concerned with issues of contract negotiation and enforcement. SORE's primary concerns are with other issues: SORE's members have a direct and specific interest in achieving a reorganization of the Milwaukee that will permit the continued existence of their jobs on the western lines. SORE seeks to represent this interest by taking positions, and proposing alternatives, on

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9 The Brotherhood of Railway and Airline Clerks, for example, not only represents persons employed as clerks throughout the nation in the rail industry, but also represents clerks in the airline and steamship industries as well. The pipefitters, boilermakers, and many of the other craft unions represent memberships that extend to a very large number of different industries.

issues relating to the economic viability of the western lines, preservation of the Milwaukee's competitive position while reorganization is pending, and a variety of other issues largely beyond the scope of the representation that the national unions can be expected to bring to these proceedings.

Given these considerations, it should be clear that representation of SORE's interests by the national unions "is" or "may be" inadequate because of the very real possibility that honest disagreements, and possibly actual conflicts, may arise between the interests of SORE's members and the memberships of the national unions.[10] For example, it is inevitable that many of the important decisions to be made in these proceedings will have an impact upon whether the Milwaukee survives as an important competitor to the Burlington Northern and Union Pacific railroads in the Northern Tier states. The national unions may well owe a duty of representation to their members who are employees of those competitor railroads,

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> [i]n order to establish that representation of the interest of the applicant for intervention by existing parties is or may be inadequate, it is not necessary to show that such parties or their counsel are not acting in good faith or are not properly discharging their duties . . . .

Atlantic Richfield Co. v. Standard Oil Co., 304 F.2d 387, 392-93 (D.C. Cir. 1962).

"An even stronger case [for intervention] is made when present parties recognize non-identity of their interests and support the position of the applicant." 3B Moore's Federal Practice § 24.09-1 at 24-316 n. 10 (1978-79 Supplement), citing In re Oceana International Inc., 49 F.R.D. 329, 333 (S.D.N.Y. 1970).

who vastly outnumber the members who work for the Milwaukee, that could result in positions being taken in these proceedings that would not adequately express the wholehearted and unequivocal interest SORE's members have in preserving the Milwaukee in the strongest possible competitive position on its western lines.[11]

For reasons outlined above, it is clear that the interest of SORE's members in preserving their jobs and presenting a reorganization plan for the Milwaukee's western lines is not adequately represented by the existing parties.

III.

SORE'S WILLINGNESS TO ASSUME, IF NECESSARY, AN OWNERSHIP ROLE IN A REORGANIZED WESTERN LINE SHOULD BE SUPPORTED BY ANY PARTY THAT GENUINELY SUPPORTS REORGANIZATION

Objectors' suggest that SORE's interest in submitting an alternative plan in which the member employees are prepared, if necessary, to assume a substantial ownership role makes it inappropriate for SORE to intervene. (Indenture Trustees' Memo,

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[11] The importance of this consideration recently was underscored, albeit inadvertently, by counsel for the Trustee who takes the position that discovery of whether SORE has any members who reside east of Miles City, Montana, is necessary in order to adequately evaluate SORE's motion for permissive intervention. Counsel explained this request by saying that such information is necessary in order to investigate the "conflict" that such representation supposedly would involve. Counsel's argument recognizes that the outcome of these proceedings almost certainly will affect different geographic groups of Milwaukee employees differently. The suggestion that an employee association such as SORE cannot adequately represent all employees on the Milwaukee's western lines because of a geographically-based conflict of interest is hopelessly inconsistent with objector's argument that the national unions, which represent employees everywhere on the Milwaukee system, and employees of competing carriers, and employees in other industries, adequately represent the interest of SORE's members.

6; Trustee's Memo, 10). Objectors' position is startling -- particularly if, as they say, objectors genuinely desire a successful reorganization of the Milwaukee. The argument amounts to the proposition that SORE's motion to intervene should be denied because SORE's participation might help it obtain information that would help it make an acceptable offer. Since the terms of any purchase must ultimately be consented to by the Trustee, and approved in these proceedings, objectors; opposition is all the more unfathomable.[12]

IV.

NO ONE WILL BE PREJUDICED IF SORE IS PERMITTED TO INTERVENE

The service list for these proceedings lists 43 different participants that are already involved. It does not appear likely that any reorganization plans will be submitted before summer, at the earliest. Accordingly, permitting SORE to intervene as one additional party would not prejudice anyone, or even harm, in any way, the legitimate interests of any of the existing parties.

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12 The only conceivable reason for anyone to object to anything that might facilitate an acceptable offer by SORE for the western lines would be that the terms of the sale might somehow prevent or impede the ultimate liquidation of the remaining portion of the Milwaukee Road. And although it is true that complete liquidation of the Milwaukee Road would be far more valuable to the Milwaukee's shareholders and long-term creditors and bondholders than a successful and profitable reorganization, those particular interests of objectors do not deserve any protection from the court. Certainly, those interests do not outweigh SORE's members interest in preserving their jobs and the public's interest in preserving service.

The banks' argument that the right to appeal "should not be placed in the hands of a group which has publicly announced opposition to the . . . Trustee's policies and which has a narrow self-interest inconsistent with the goals of this Court, the Trustee, and the present intervenors -- a successful reorganization," could hardly be more disingenuous. No one has a more "narrow self-interest" in these proceedings than the banks whose sole goal is liquidation. Indeed, these very interests have used their right to appeal once already in an irresponsible attempt to block the Trustee from spending ERSA funds desperately needed to keep the railroad running at an acceptable level of service.

SORE's purpose in seeking intervention here is precisely to pursue the goal of "a successful reorganization" on the western lines. It is precisely because SORE seeks to present a meaningful reorganization option, and at present is the only group seriously advocating such an alternative, that objectors seek to silence the group. The banks' position apparently is that only persons who agree with the Trustee's liquidation scheme should be permitted to intervene.

Although it is probably true that these proceedings would be streamlined if only the liquidation options favored by the objectors were permitted to be represented here, that is not the purpose of these proceedings. SORE's intervention is timely and would make available to the Court vigorous representation of nationally significant interests and reorganization alternatives that could be of very great assistance to the Court and to the ICC.

CONCLUSION

For the reasons stated above, SORE respectfully requests the Court to grant its motions for leave to intervene.

DATED this 5th day of March, 1979.

Respectfully submitted:

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