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June 7, 2003

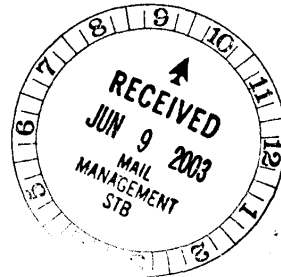
Via UPS Next Day Air

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

JUN 09 2003

Part of
Public Record



Re: Ex Parte 638 – Procedures To Expedite Resolution Of Rail Rate
Challenges To Be Considered Under The Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten (10) copies of the Initial Comments of Union Pacific Railroad Company in Response to April 3 Decision. Also enclosed is a diskette with a copy of the filing in Microsoft Word 97 format.

Attachment 3 to Union Pacific's Initial Comments contains material that Union Pacific has designated confidential under a Protective Order in Docket No. 42058, *AEPCO v BNSF and UP*. Union Pacific is submitting this confidential material in a separate package as required by 49 C.F.R. 1104.14(a).

Union Pacific is also submitting a Public Record Version of Union Pacific's Initial Comments, including a redacted Attachment 3. The redactions to Attachment 3 are modest and involve no information relevant to this proceeding, but Union Pacific is willing to provide a confidential version to any party willing to sign a suitable confidentiality undertaking.

Kindly acknowledge receipt and filing of this material by date-stamping the extra copy of this letter and returning it in the self-addressed, stamped envelope enclosed.

Sincerely,

cc: Parties of Record
Encls.

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JUN 09 2003

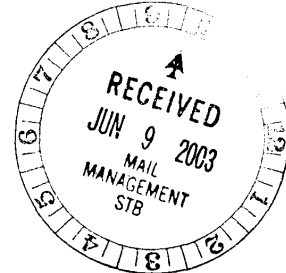
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ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

Procedures To Expedite Resolution)
Of Rail Rate Challenges To Be)
Considered Under The Stand-Alone)
Cost Methodology)

Ex Parte No. 638



207991

**INITIAL COMMENTS OF UNION PACIFIC RAILROAD COMPANY
IN RESPONSE TO APRIL 3 DECISION**

ENTERED
Office of Proceedings

JUN 09 2003

Part of
Public Record

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ATTACHMENTS

Attachment 1	Proposed Standard Discovery from Complainants in SAC Rate Cases
Attachment 2	Proposed Standard Discovery from Railroads in SAC Rate Cases
Attachment 3	Union Pacific's Objections and Responses to [AEPCO's] Amended and Supplemented Interrogatories and Requests for Production
Attachment 4	Proposed Standard Protective Order

Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand-Alone Cost Methodology	)))))	Ex Parte No. 638
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Union Pacific Railroad Company ("UP") welcomes this opportunity to share our suggestions and respond to the suggestions of others on how discovery in stand-alone cost ("SAC") rate cases can be improved. No party benefits if discovery is unnecessarily prolonged or if avoidable discovery disputes arise. UP believes that many opportunities exist to improve discovery so that the resources devoted to rate case litigation can be more productively focused on the merits of the case. UP offers these comments.

In its decision served April 3 ("April 3 Decision"), the Board adopted a number of changes that should expedite rate cases. Based on the comments of parties in testimony and at the February 27, 2003, hearing, however, the Board acknowledged further opportunities to improve rate case discovery. *Id.* at 5. Accordingly, the Board invited parties to provide comments on a variety of issues.

Generally, UP favors the proposals in the April 3 Decision. UP endorses the adoption of standard discovery requests. We believe that certain key information can and should be produced with the complaint, but that it is not practicable for a defendant to provide meaningful information with its answer. We urge the Board to adopt stringent limits on the number of discovery requests permitted in SAC cases and to establish standard time periods. UP believes the Board has the authority to require indemnification of the cost of discovery, but some discovery is so burdensome that it should not be required even if the requesting party is willing to pay. Our comments include several concrete suggestions on how to implement discovery reforms, but our proposal that the Board require parties to share the costs of a secured website offers particular promise to expedite discovery.

I. Standard Discovery Requests.

UP supports the adoption of standard discovery requests. The more discovery can be made routine, the less opportunity there will be for disputes. Moreover, the collection, production and review of data will be faster and less expensive for all parties. Parties should remain free to modify standard discovery requirements by mutual agreement, but the bulk of the data produced should be predictable and familiar.

Rate cases are well-suited to standard discovery requests. The nature of the cost information that parties must submit for both variable and stand-alone costing is well-understood by the small community of the bar and consultants who deal with SAC rate cases. In fact, the Board has already adopted standard evidentiary formats for both. Moreover, the vast majority of the discovery complainants serve on railroads recycle the same requests -- in virtually the same order.

Yet disputes still arise. Some differences involve the proper geographic scope for the particular complaint or the appropriate cut-off dates.¹ Unfortunately, many disputes arise because different lawyers, even at the same firm, take differing positions on how much discovery they demand, regardless of the burden of production, its cumulative nature, or the slim probability that the material will be used or useful. UP acknowledges that not all rate cases are the same and that not all parties can provide the same information. Nonetheless, we believe that by adopting a standard checklist of information that parties can reasonably expect to produce or receive the potential for conflict can be reduced and discovery expedited.

UP appends a list of material that it would expect to receive from every complainant in Attachment 1, *Proposed Standard Discovery from Complainants in SAC Rate Cases*. UP's proposed list of what it would expect to produce is in Attachment 2, *Proposed Standard Discovery from Railroads in SAC Rate Cases*.² Both lists include discovery related to qualitative market dominance and variable costs, as well as stand-alone costs, because all three subjects arise in each SAC case. As part of the production of electronic data, the field layout, field definitions, and decoders should also be provided. If a party produced material that meets those descriptions, it should have

¹ Ways to avoid disputes on cut-off dates are discussed below in Section IV.

² UP also includes for the Board's reference a copy of the discovery requests served on UP in its most recent SAC case. See Attachment 3, Union Pacific's Objections and Responses to [AEPCO's] Amended and Supplemented Interrogatories and Requests for Production of Documents. The discovery requests in Attachment 3 are provided for context only; UP does not endorse those requests as written.

no further obligation to produce additional material with a different format absent a compelling need.

II. Timing of Production.

The complainant should produce some of its standard discovery material with its complaint. Specifically, all market dominance materials and the work papers associated with the jurisdictional threshold calculation (Items 5 through 10 in Attachment 1) should be served with the complaint.³ Volume projections for the complaint traffic and other highly confidential data could be served on outside counsel as soon as defendant identifies them.

The complainant controls whether and when it will file its complaint, so serving discovery with the complaint imposes no additional burden. Providing immediate discovery will aid both the Board and the defendant to become familiar with key issues more quickly. It will also facilitate the activities that must occur promptly after the complaint is filed, including mediation and a conference to discuss the procedural schedule and discovery. Both must occur within a matter of days after the complaint is served. Production of market dominance material and volume projections should help

³ This assumes that a protective order is in place. UP also proposes that the Board adopt a standard protective order that applies in all SAC rate cases unless or until the parties propose, and the Board adopts, a different protective order for a particular case. UP has included a model based on the protective order in Docket No. 42058, *Arizona Electric Power Cooperation, Inc. ("AEPCO") v. BNSF and UP* as modified by the Board's decision in this proceeding served June 6, 2003. See Attachment 4. Adopting a generic protective order in SAC cases offers incidental benefits as well. The parties could face one less task before mediation and dealing with the procedural requirements at the beginning of a case and the Board may reduce the number of protective orders it has to review.

the parties develop a rational discovery plan and procedural schedule. It should also facilitate mediation.

Defendants should not be required to produce discovery with their answers. Unlike complainants, defendants do not control when a complaint will be filed, and may not even know that a shipper will file a complaint.⁴ Nor do they know the scope of a complaint until it is filed.⁵ Even if a contract expires and no agreement has been reached on a new contract rate, that is not an inevitable sign that a rate complaint will be filed.⁶ Thus, defendant does not have the prior notice necessary to enable it to find and produce useful information twenty days after a complaint arrives.

Moreover, defendants face a number of other deadlines soon after they receive the complaint. Besides investigating the facts to prepare an answer, the defendant must participate in both mandatory mediation and a conference to discuss procedural matters within seven days. 49 C.F.R. Parts 1111.8 and 1111.10. The only materials that it may be practicable for a defendant to produce within a 20-day timeframe are

⁴ In *OPPD v. UP*, Docket No. 42006, UP was not a party to any contract and OPPD's contract with another carrier was still in effect. Yet OPPD filed a complaint against a rate that had not changed in more than six years with little advance notice.

⁵ In *FMC v. UP*, Docket No. 42022, UP was asked to publish 115 tariff rates for 8 different commodities from 9 different origins to numerous destinations. Yet FMC's complaint ultimately involved only 16 different rates for 6 different commodities from only 4 origins.

⁶ A UP-Northern States Power ("NSP") contract expired in 1999 without agreement on a new rate. On NSP's request, UP published a common carrier rate to be effective January 1, 2000. Later, UP and NSP agreed to an interim contract for 2000. Only when they were unable to reach agreement on the rate to be effective in 2001, did NSP file a complaint.

generic documents that would be produced in any SAC case (e.g. the timetable or density charts).

III. Additional Discovery.

The Board should limit the total number of discovery requests whether it adopts standard discovery or not. Any additional requests would require prior approval by the Board or be mutually agreed to by the parties. The limit should not distinguish between document requests, interrogatories or requests for admissions. In addition, the Board should adopt a presumption that limits discovery requests to information sufficient to show (with the exception of qualitative market dominance) to prevent cumulative discovery.

A. Limit on Requests.

If the standard discovery UP proposes in Attachments 1 and 2 is adopted, complainants should be limited to 30 additional requests and defendants to 15 requests. Even with standard discovery, some cases may require the opportunity to pursue limited discovery on additional topics. Therefore, a limited number of discovery requests besides the standard requests should be allowed. For example, if an origin mine may close, defendants may need information about its projected life. The opportunity to make a certain number of requests beyond the standard checklist ensures they can address any unusual features in the case. If no standard discovery is established, the limit for complainants should be 80 requests and for defendants 25.

A limit on the total number of requests forces the requesting party to identify what is really useful to its case and focus its inquiries accordingly. A limit should also curb

obviously objectionable requests.⁷ Finally, limiting the total number of requests will discourage duplicative requests.

It is much more difficult to plan and supervise a coherent search when a party asks for essentially the same information in several similar, but not identical, requests. Redundancy complicates searches and production without improving the amount of useful information. One complainant served UP with a second and third set of discovery with 18 interrogatories and 9 document requests focused on whether or how UP could measure actual fuel consumption for specific trains. These requests tested the creativity of the complainant's lawyers as well as the patience of railroad mechanical and operating personnel; yet the barrage did not elicit actual fuel consumption data for the complaint traffic or remove any of the real world obstacles to obtaining such information. The discovery did succeed, however, in diverting the time and attention of numerous railroad personnel to trivia regarding throttle settings and fuel gauges.

B. Limit Should Apply to Most Forms of Discovery.

UP believes that an overall limit that does not distinguish between the most common forms of discovery (i.e., document requests, interrogatories and requests for admission) combines the advantages of flexibility for the parties with ease of enforcement. An undifferentiated limit allows a party to design its discovery requests in

⁷ One would expect blatantly objectionable requests to be a rare occurrence, but UP received them in its two most recent cases. AEPCO asked for divisions on the interline rates at issue after having its earlier motion to compel the same information denied. See Attachment 3, AEPCO Amended Interrogatory 5 and UP Response, at 9. See *also* *NSP v. UP*, Docket No. 42059, Decision served May 24, 2002, at 8. (NSP request for internal cost data virtually identical to discovery disallowed in another case.)

the form that it considers most useful. But it also removes the opportunity for evading the limit by gaming how to frame discovery requests. Depositions and requests to inspect should not be included within the limit because they are both unusual and by their nature more protracted.

C. Multiple Versions or Formats.

The April 3 Decision specifically requested comments on whether limiting the number of requests would prevent requests for multiple versions or formats. At 6. A limit on the total number of discovery requests will discourage, but by itself will not prevent, such abusive discovery. Cumulative separate requests can be combined in order to comply with the numerical limit without reducing the scope of discovery requested. To prevent cumulative discovery, the limit on the number of requests should be combined with a presumption that requests seeking all information or documents "relating to or regarding" costs, operations or traffic characteristics are overbroad.⁸ The production of responsive material that is "sufficient to show" the information requested should be deemed satisfactory unless the seeking party shows a particularized need for additional data and why the data provided cannot be used for the same purpose.⁹

To be fair, cumulative discovery cannot be attributed to complainants alone; the Board has contributed to this problem. Decisions granting motions to compel, despite

⁸ No such presumption should apply to qualitative market dominance discovery regarding the negotiations of the parties and the knowledge of the parties regarding transportation alternatives.

⁹ In some cases, the complainant has limited its requests in this way. See RFP 47 in Attachment 3, at 46.

demonstrations that substantial responsive material had already been produced and that the production of additional material would be cumulative and burdensome, invite zealous counsel for complainants to demand as many data sources as possible.

IV. Time Periods.

UP endorses standard time periods for which discovery should be produced. We have identified appropriate periods in Attachments 1 and 2 for standard discovery. The standard time periods should apply to additional discovery on the same topic.

Standard time periods will help to avoid “stop-and-go” discovery and expedite completion of discovery. They will also encourage parties to undertake discovery sooner in assurance that they will not have to retrace their steps to go further back in or to supplement their discovery.¹⁰ With such dates in place, railroads can instruct the employees assisting in the discovery which material is responsive and which is not.

Without both start and end dates, UP faces the choice of either (1) repeating searches in order to supplement its production until the other side is satisfied or the Board imposes a discovery deadline or (2) refraining from collecting responsive material until the dates are settled. The former not only imposes additional costs on both sides due to repeated productions, it imposes a significant burden on UP personnel who have heavy workloads and cannot afford the time for repeated searches. The latter leads to

¹⁰ Establishing standard time periods will encourage parties to begin discovery sooner by reducing uncertainty about the chronological scope of the search. However, if there is an unresolved dispute about the geographic scope of the discovery (e.g., should defendants produce traffic data for 14 states or only certain lines in four states where the complaint traffic actually moves), a defendant will defer production until it knows exactly what it needs to produce.

periods of long inactivity with sudden and short deadlines to produce the responsive material. Neither alternative fosters efficient and well-organized production.

Generally speaking, four calendar quarters of operating statistics suffice for most variable cost purposes.¹¹ Typically, a complaint is filed shortly after a contract has expired, so the discovery would be for the year prior to the complaint. If the complainant waited more than one year to file its complaint, however, the beginning date could be extended. A complainant should not need more than two years (i.e., eight calendar quarters) of information, consistent with the statute of limitations in 49 U.S.C. § 11705(c).

For stand-alone costs, discovery material is used for a wider variety of purposes and differing time periods should apply for various requests. UP suggests no more than two years for certain cost-of-construction information (e.g., MOW wages, purchases and sales of land, Authorities for Expenditures), because the construction period typically begins within two years before the complaint. For traffic data and related contracts and price instruments, the limits should also be two years prior to the complaint. On the other hand, only snapshots are required for other requests. For example, only the most current description of facilities (e.g. track charts, lists of crossings, bridges, culverts) timetable, or investment in equipment (e.g., locomotives, cars or EOTD's) should be required. The burden associated with developing a chronological series would be immense, but the value of the incremental information insignificant.

For qualitative market dominance, the start date should extend one year before the effective date of the most recent expired contract. For example, if a complaint is filed

¹¹ UP proposes calendar quarters because the parties submit evidence and the Board determines costs for calendar quarters.

at the end of 2003 and the traffic previously moved under a contract in effect from January 1, 1999 through December 31, 2003, then discovery would extend to January 1, 1998. This would capture information about the competitive factors that influenced the most recent rates agreed to by the parties. If no contract was in place before the complaint was filed, then the start date should be five years prior to the complaint preceding the establishment of the rate at issue, if it is new traffic.

V. Costs.

The April 3 Decision asked for comments on (1) whether it has the authority to require cost sharing, (2) in what circumstances it should require cost sharing, (3) how to quantify such costs, and (4) how, if at all, costs should be divided between the parties. UP believes that the Board can require a party to indemnify the producing party for reasonable expenses, and that it should do so in appropriate circumstances. Besides out-of-pocket costs, the reimbursement should cover the employee time and computer processing time. The party seeking costly, extensive discovery should ordinarily bear the cost. Reimbursement for the cost of discovery, however, is no panacea for burdensome discovery.

A. Board's Authority to Require Cost Sharing.

The Board can direct a party seeking discovery to pay the reasonable expenses associated with producing the information in a protective order. 49 C.F.R. 1114.21(c)(3). Moreover, Congress has directed the Board to minimize the burden on rail carriers to provide cost information. 49 U.S.C. §10101(13).

B. Circumstances When Parties Should be Required to Share Costs.

The Board should require the parties to share the costs associated with discovery: (1) when the parties have agreed to share costs, (2) to establish and maintain a secure website for discovery, and (3) when the producing party objects to discovery as burdensome, but only if the burden can be alleviated by payment.

The Board has consistently encouraged parties to negotiate agreements to resolve their differences in a proceeding. Compensation for discovery is particularly suited to compromise since the parties can evaluate whether the value of the discovery is worth the cost to obtain it. The Board should encourage these compromises. If the parties agree to share the costs of some or all of the discovery in a case, the Board should be prepared to enforce payment in accordance with the terms of such agreements. UP has had the unfortunate experience where the parties agreed to pay for copies and for data cartridges produced, but after UP produced more than 200,000 pages and hundreds of data cartridges, the complainant failed to pay the net amount it owed.

The Board should also consider requiring the parties to share the costs of using a secure website to produce and access discovery in a SAC rate case. Using a website for discovery could substantially expedite discovery and make discovery more efficient for both parties. Posting discovery material (including discovery requests, responses and correspondence) on a secured website:

- Eliminates the time and cost of copying;
- Disseminates the information among the lawyers, consultants and witnesses more quickly and reliably;

- Simplifies compliance with protective orders regarding the destruction and return of confidential data when the proceeding terminates; and
- Facilitates discovery conferences with the Board staff.

The Board should initiate a technical conference or negotiated rulemaking to explore the mechanics of using secured websites. Input from a representative group of interested parties, including some with technical qualifications, is desirable. Working out the practical aspects of creating such a website and the necessary protocols is not feasible in individual cases given all the other deadlines that the parties face immediately after a complaint is filed.

Finally, the Board should be prepared to issue a protective order requiring the party that seeks discovery to pay the expenses the responding party incurs in appropriate circumstances. The Board should recognize, however, when reimbursement does not remove the burden and the discovery is marginal, it would be inappropriate to require production even if the requesting party is willing to pay. To determine whether the discovery should be required, the Board should weigh the usefulness of the material sought to deciding issues in the case, whether more readily available material would be suitable, whether the material sought is cumulative and the burden associated with producing the discovery. The Board should be prepared to deny burdensome, unnecessary discovery even when the party seeking it is willing to pay the out-of-pocket expenses of the producing party, because cash payment may not make the producing party whole.

Reimbursement does not allow the producing party to recover the opportunity costs of diverting people to responding to discovery. The chief constraint UP faces in

responding to discovery is a severely reduced workforce. Since the first full year after the UP/SP merger, the number of UP employees has declined by more than 5,300, or 10% by the end of 2002. But the decline in the ranks of the professional and administrative personnel, those most involved in responding to discovery, has been even more dramatic. By the end of 2002, there were nearly 2,000 fewer of those employees or a decline of 36%. Since the beginning of 2003, UP has reduced ranks by nearly another 500 positions, concentrated in administrative forces.

At the same time, the number of carloads UP moves increased 8%. The remaining employees are busy scheduling and dispatching trains, maintaining safe operations, supporting computer systems, negotiating rates, issuing and paying bills, and much, much more. Responding to discovery consumes time that would otherwise be directed towards mission-critical duties. Cash payments do not increase the time available or reduce those job demands. Nor would intermittent payments support hiring a cadre of employees dedicated to responding to discovery in rate cases.

Rail carriers have an obligation to make relevant cost data available as required by the rules of discovery, but the Board has an obligation to minimize the burden on rail carriers to produce cost information. 49 U.S.C. §10101(13). All rail customers, including the coal shippers who bring most rate cases, have benefited from the dramatic reduction in railroad employment and the associated productivity improvement,¹² but only a handful of shippers require SAC rate case discovery. Having enjoyed the fruits of

¹² See "Rail Rates Continue Multi-Year Decline" STB Office of Economics, Environmental Analysis and Administration, December 2000 at 4-5. Coal represented 21% of rail revenues, but received 29% of the dollar savings in rate reductions. At 7.

railroad productivity, shippers with rate complaints must understand that railroads are unable to produce information in whatever form their consultants may wish and must accept reasonable limits on the level of information that can be produced.

C. Quantifying of the Costs of Production.

To quantify the cost of production, UP recommends the cost elements it has typically included when it has agreed on compensation to be paid by the other party. The primary element is the time of the employees engaged in the discovery effort. An hourly rate can be derived by dividing the annual wage levels (including benefits) for the positions that will perform the work by 1920.¹³ UP currently bills computer-processing time at a rate of \$0.70 per CPU minute. We generally use a standard rate of 10 cents/page for normal copies and actual costs for larger-size copies. Other out-of-pocket costs should be paid on an actual basis.

D. Dividing Costs Between the Parties.

For a discovery website, the cost should be split per capita among the parties. The Board should direct that if a receiving party did not agree to pay its share of the cost of setting up and maintaining a secure discovery website, then it would have to pay for all copying expense, including data tape cartridges or compact disks, and shipping.

For other costs such as programming or computer-processing time, UP's recommendation is to rely in the first instance on the parties to reach agreement. If, however, the Board makes it clear that the requesting party will bear the cost of

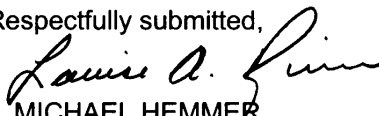
¹³ 1920 work hours/year reflects a 40-hour week, two weeks of vacation and 11 holidays.

burdensome discovery, it may encourage parties to agree on obtaining useful information in the most efficient way.

Conclusion

UP supports the efforts of the Board to make discovery in SAC rate cases more useful and less disruptive. By making discovery more routine and less subject to dispute, the cost and time required for SAC rate proceedings can be reduced substantially.

Respectfully submitted,



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June 7, 2003

Attorneys for Union Pacific Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Comments of Union Pacific Railroad Company was sent on this 7th day of June 2003, by first-class mail, postage prepaid, to:

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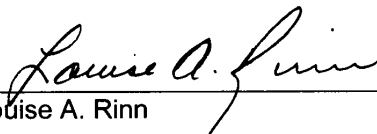
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**PROPOSED
STANDARD DISCOVERY FROM COMPLAINANTS
IN SAC RATE CASES**

Item	Description of Discovery Material	Used For ¹	Time Limits ²
1	Freight bills or other documents sufficient to show number of tons and carloads of complaint traffic moved. If reparations before complaint was filed are sought, documents sufficient to show freight charges actually paid by complainant.	VC SAC	Four calendar quarters prior to complaint
2	Documents sufficient to show cycle time if complainant provides cars.	VC SAC	Four calendar quarters prior to complaint
3	Documents sufficient to show amounts complainant received in allowances (e.g., mileage, switching) from defendant(s) for complaint traffic.	VC SAC	Four calendar quarters prior to complaint
4	Description of track layout at origin (if complainant is shipper) or destination (if complainant is receiver).	VC SAC	Current
5	Documents sufficient to show rate history, including terms and conditions (e.g. weight limits, volume commitments, equipment).	MD SAC	From expiration of previous contract through the most recent contract to the complaint date
6	All correspondence relating to, and all studies, analyses or memoranda regarding, rate, including negotiations for contract that just expired, including any amendments or modifications.	MD	One year prior to the effective date of the most recent contract
7	All correspondence relating to, and all studies, analyses or memoranda regarding, negotiation of or request for rates to replace expired contract. If no prior contract, all documents relating to establishment of complaint rate.	MD	Five years prior to complaint
8	All correspondence relating to, and all studies, analyses or memoranda regarding, transportation alternatives for the complaint traffic.	MD	One year prior to the effective date of the most recent contract
9	Projected volumes of complaint traffic, prepared in the ordinary course of business, including the underlying assumptions.	SAC	Two years prior to complaint
10	All work papers underlying the calculation of whether rate exceeds the jurisdictional threshold.	VC	

¹ VC = variable cost. SAC = stand-alone cost. MD = qualitative market dominance.

² If complainant is seeking reparations for traffic that moved before the complaint was filed, the beginning cut-off date for Items 1 through 3 would be the calendar quarter the first movement originated. This would be subject to a maximum of two years, which corresponds to the statute of limitations. 49 USC §11705(c).

**PROPOSED
STANDARD DISCOVERY FROM RAILROADS
IN SAC RATE CASES**

Item	Description of Discovery Material ¹	Used For ²	AEPCO Request ³	Time Limits ⁴	Comments ⁵
Market Dominance					
1	Documents sufficient to show rate history, including terms and conditions (e.g. weight limits, volume commitments, equipment).	MD SAC	N/A	From expiration of previous contract through the most recent contract to complaint date	
2	All correspondence relating to, and all studies, analyses or memoranda regarding, rate, including negotiations for contract that just expired, including any amendments or modifications.	MD	N/A	One year prior to the effective date of the most recent contract	
3	All correspondence relating to, and all studies, analyses or memoranda regarding, negotiation of or request for rates to replace expired contract. If no prior contract, all documents relating to the establishment of complaint rate.	MD	N/A	Five years prior to complaint	
4	All correspondence relating to, and all studies, analyses or memoranda regarding, transportation alternatives for the complaint traffic.	MD	N/A	One year prior to the effective date of the most recent contract	If rate for new traffic or no prior contract, 5 years before complaint

ATTACHMENT 2

Item	Description of Discovery Material ¹	Used For ²	AEP/CO Request ³	Time Limits ⁴	Comments ⁵
General Operating					
5	Description of the service for the complaint traffic.	VC SAC	Am. Int. 1	Current	
6	Operating timetables.	VC SAC	RFP 1	Current	For complaint route and reasonably adjacent lines.
7	Crew districts and associated train statistics.	VC SAC	RFP 4	Four calendar quarters prior to complaint	For complaint route and reasonably adjacent lines.
8	Operating statistics and density data by line segment for complaint route.	SAC	RFP 7	Four calendar quarters prior to complaint	For complaint route and reasonably adjacent lines.
9	Cycle time data for complaint traffic.	VC SAC	RFP 11	Four calendar quarters prior to complaint	
10	Delay reports for complaint traffic.	VC	RFP 25	Four calendar quarters prior to complaint	This may not exist, or be called by a different title, at other railroads.
11	Helper service description and helper crew data (if applicable).	VC SAC	RFP 26 RFP 27 RFP 28	Four calendar quarters prior to complaint	
12	Switching studies for complaint traffic (if any).	VC SAC	RFP 29	1 year prior to complaint	Only the description of switching activities would be produced. Any internal costs would be redacted.
13	Loss and damage by commodity.	VC SAC	RFP 30	Last calendar year prior to complaint	
14	Describe locomotive fueling for complaint traffic.	VC SAC	RFP 21a	Current	

ATTACHMENT 2

Item	Description of Discovery Material ¹	Used For ²	AEP CO Request ³	Time Limits ⁴	Comments ⁵
15	Joint facilities used by complaint traffic and applicable agreements and bills.	VC SAC	RFP 33	Current Agreement. Bills for four calendar quarters prior to complaint.	Limited to joint facilities on complaint route.
Locomotives					
16	Run-through and horsepower equalization agreements for locomotives used for complaint traffic.	VC SAC	Am. Int. 6	Current	Produce only agreements that apply to movements subject to complaint.
17	Identify all locomotives used for complaint traffic.	VC SAC	RFP 15	Four calendar quarters prior to complaint	
18	Locomotive investment, lease costs or purchase, and characteristics for each unit. Depreciation rate and salvage value from STB-prescribed schedule.	VC SAC	RFP 16	Current	AEP CO request had 24 subparts (a-v,iii). Not all of that information exists. For example: miles in various types of service is not available.
19	Locomotive lease/rental agreements.	VC SAC	RFP 17	Current leases only	Locomotive leases generally apply to hundreds of units and are voluminous. Parties should negotiate a reasonable selection of leases.
20	Identify foreign locomotives used for complaint traffic and produce documents governing compensation to owner.	VC SAC	RFP 18	Four calendar quarters prior to complaint	
21	Locomotive maintenance agreements.	SAC	RFP 20	Current	Reasonable selection to be negotiated.
Cars/Equipment					
22	Car inspection: describe locations, procedures, quantity, and rates of pay for inspectors.	VC SAC	RFP 31	Four calendar quarters prior to complaint	
23	End-of-Train Device (EOTD) purchases, price. Depreciation rate and salvage value from STB-prescribed depreciation schedule.	VC SAC	RFP 32	Current	

ATTACHMENT 2

Item	Description of Discovery Material ¹	Used For ²	AEPCO Request ³	Time Limits ⁴	Comments ⁵
24	Freight car purchases or leases: include terms, characteristics, date of acquisition. Depreciation rate and salvage value from STB-prescribed schedule.	SAC	RFP 35	Current Leases only	Types of cars to be included to be negotiated.
Tracks					
25	Maximum permissible gross weight per railcar for each line segment.	SAC	Am. Int. 3	Most current	
26	Track charts or condensed profiles.	VC SAC	RFP 2	Current	For complaint route and reasonably adjacent lines.
27	Length of mine loop tracks (including schematics if available).	VC SAC	RFP 3	Current	For coal cases only.
Crews					
28	Crew wages for trains with complaint traffic.	VC	RFP 3	Four calendar quarters prior to complaint	AEPCO request had 24 subparts.
SAC Traffic					
29	Traffic data for lines reasonably adjacent to complaint route.	SAC	RFP 42	Two years prior to complaint	Exact scope needs to be negotiated for each case. Typical request includes 31 subparts of information, including information UP does not have or that is not available in form requested (e.g. off-line miles, interchange date and time).
30	Density charts	SAC	RFP 8	Two years prior to complaint	May be limited to complaint route and reasonably adjacent segments.
SAC Construction					
31	MOW wage rates.	SAC	RFP 58	Two years prior to complaint	
32	Cost of track materials, including rail, lubricators, ties, OTM track geometry car, signs.	SAC	RFP 64 RFP 86	Current	Related transportation costs to be negotiated.
33	Bridge inventory, including description of size and type.	SAC	RFP 65 RFP 66	Current	For complaint route and reasonably adjacent lines.
34	Crossings inventory, including location and description of size.	SAC	RFP 68 RFP 69	Current	For complaint route and reasonably adjacent lines. Costs of actual crossings or components to be negotiated.

ATTACHMENT 2

Item	Description of Discovery Material ¹	Used For ²	AEP/CO Request ³	Time Limits ⁴	Comments ⁵
35	Hot bearing and dragging equipment locations.	SAC	RFP 70	Current	For complaint route and reasonably adjacent lines.
36	Microwave tower locations.	SAC	RFP 72	Current	For complaint route and reasonably adjacent lines.
37	Microwave tower costs – description of components and their costs for typical towers.	SAC	RFP 73	Current	
38	Tunnel location, size, and material.	SAC	RFP 74	Current	For complaint route and reasonably adjacent lines. Actual cost of construction generally not available.
39	Facilities: locations, description of components.	SAC	RFP 75 RFP 76	Current	Typical request includes 13 different types of facilities. Specific cost data generally not available.
40	Culverts: location, description.	SAC	RFP 85	Current	For complaint route and reasonably adjacent lines.
41	Values for land associated with line sales, purchases or abandonments and any related appraisals.	SAC	RFP 79	Within last two years	For locations reasonably adjacent to complaint route.
42	Valuation maps.	SAC	RFP 77	N/A	For complaint route and reasonably adjacent lines.
43	Ballast and grading unit costs.	SAC	RFP 84	Current	
44	Authorities for Expenditures ("AFE") for each construction and MOW project over \$1 million.	SAC	RFP 88	Two years prior to complaint	For states in which complaint traffic moved.
45	Rail lubrication: description of types of lubricators used and their location and cost.	SAC	RFP 102	Current	For complaint route and reasonably adjacent lines.
46	SAC Operating				
	Historical cycle time data.	SAC	RFP 46	For two years prior to complaint	For trains running on lines reasonably adjacent to complaint route.
47	Car movement records.	SAC	RFP 49	To be negotiated	These are particularly voluminous files.
48	Locomotive assignment criteria.	SAC	RFP 51	Current	

ATTACHMENT 2

Item	Description of Discovery Material ¹	Used For ²	AEPSCO Request ³	Time Limits ⁴	Comments ⁵
SAC-DCF					
49	Annual and quarterly wage forms.	VC SAC	RFP 57	Four calendar quarters prior to complaint	
50	Ad valorem taxes for each state.	SAC	RFP 89	Most recent year	For states that complaint traffic traversed.
51	Criteria for expensed vs. capitalized MOW expenses.	SAC	RFP 59 RFP 60	Current	

NOTES:

¹ If response derived from a database, it will be provided in an electronic form with field layout, field definitions and decoders also provided.

² VC = variable cost. SAC = stand-alone cost. MD = qualitative market dominance.

³ Refer to Attachment 3 for copy of discovery requests served by AEPSCO and UP's Objections and Responses.

⁴ If complainant is seeking reparations for traffic that moved before the complaint was filed, the beginning cut-off date would be the calendar quarter the first movement originated. This would be subject to a maximum of two years, which corresponds to the statute of limitations. 49 USC §11705(c).

⁵ UP reserves the right to redact any information that reveals its internal costs or cost methodologies.

**PROPOSED STANDARD
PROTECTIVE ORDER**

1. This Protective Order applies to all confidential or highly confidential material submitted with: a complaint initiating a stand-alone cost rate case ("SAC Complaint"), the answer and all subsequent pleadings, and discovery produced by the parties unless superceded by a different protective order submitted by the parties to a particular proceeding ("SAC Proceeding") and adopted by the Surface Transportation Board ("Board"). A copy of this Protective Order, including the undertakings, shall be served on defendant with the SAC Complaint.

2. Subject to paragraph 3 below, any party producing material in discovery ("Producing Party") to another party to this SAC Proceeding ("Receiving Party"), or submitting material in pleadings or evidence, that the Producing Party believes in good faith reveals proprietary or confidential information, may designate and stamp such material as "Confidential," and such material must be treated as confidential. Such material, any copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the Receiving Party who have a need to know, handle, or review the material for purposes of the SAC Proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

employees, counsel, and agents, at the completion of this SAC Proceeding and any judicial review proceeding arising therefrom, except that: (1) outside counsel (but not outside consultants) for each party are permitted to retain file copies of all pleadings and evidence filed with the Board and file copies of all work product; and (2) in-house counsel for each party are permitted to retain file copies of all pleadings and evidence which he or she received during the course of this SAC Proceeding.

7. Confidential and Highly Confidential material, if contained in any pleading or evidence filed with the Board, shall, in order to be kept confidential, be filed only in pleadings or evidence submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order" or "Highly Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.
8. In the event that a party produces material which should have been designated as Confidential or Highly Confidential and inadvertently fails to stamp the material as Confidential or Highly Confidential, the Producing Party may notify the other parties in writing within ten (10) days of discovery of its inadvertent failure to make the confidentiality designation. The parties who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the Producing Party, or take such other steps as the parties agree to in writing. The Producing Party will promptly furnish the Receiving Parties with properly designated material.

9. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the Producing Party may make a written request within a reasonable time after the Producing Party discovers the inadvertent disclosure that the other parties return the inadvertently produced privileged document. The parties who received the inadvertently produced document will either return the document to the Producing Party or destroy the document immediately upon receipt of the written request, as directed by the Producing Party. By returning or destroying the document, the Receiving Party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
10. If any party intends to use Confidential and/or Highly Confidential material at hearings in this SAC Proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential and/or Highly Confidential material to any Administrative Law Judge, the Board, or the court, with a written request that the Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

11. If any party intends to use Confidential and/or Highly Confidential material in the course of any deposition in this SAC Proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such Confidential and/or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential and/or Highly Confidential material shall be kept under seal and treated as Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.
12. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the Receiving Party in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. §11904.
13. Except for this SAC Proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release Confidential or Highly Confidential material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required

shall notify the Producing Party in writing within three (3) working days of the determination that the Confidential material, Highly Confidential material, or copies or notes are to be released or within three (3) working days prior to such release, whichever is soonest, to permit the Producing Party to contest the release.

14. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by an Administrative Law Judge decision from which no appeal is taken or by the Board, warrants suspension of any of the provisions herein.
15. Information that is publicly available or obtained outside of this SAC Proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as Confidential or Highly Confidential in this SAC Proceeding.
16. A Confidential or Highly Confidential designation may be removed by consent of a party who asserts the confidential, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate Order of the Board, or of an Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.

17. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as Highly Confidential by Producing Party, without securing prior permission from the Producing Party. If a party (the "Filing Party") files and serves upon the other party (the "Reviewing Party") a pleading or evidence containing the Filing Party's Highly Confidential material, the Filing Party shall also prepare and serve upon the Reviewing Party a Confidential Version of the pleading or evidence from which the Filing Party's Highly Confidential material has been redacted within one (1) business day of the filing. The Confidential Version may be provided in hardcopy or electronic format at the option of the Filing Party, and may be disclosed to those personnel employed by the Reviewing Party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel"). Alternatively, in lieu of preparing and serving a Confidential Version of any such pleading or evidence, the Filing Party may provide to outside counsel for the reviewing party a list of the Filing Party's own Highly Confidential information that must be redacted from its Highly Confidential Version prior to review by the Reviewing Party's In-house Personnel. If the Filing Party chooses this latter option, it shall provide the list to outside counsel for the Reviewing Party within one (1) business day of the filing of the Highly Confidential version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party's In-house Personnel.

18. Workpapers accompanying a pleading or evidence and containing the Filing Party's Highly Confidential material need not be included in a Confidential Version (or substitute list) of the pleading or evidence provided to the Reviewing Party. To ensure that each party can respond with appropriate input from In-house Personnel to evidence or other material or information filed by another party, the parties shall cooperate to redact or otherwise identify, within five (5) business days of the filing of such evidence or material, portions of such workpapers filed as Highly Confidential so that redacted versions thereof can be disclosed to a party's In-house Personnel. If the parties are unable to reach agreement on appropriate redactions of Highly Confidential information or materials within five (5) business days of filing such workpapers, either party may seek appropriate relief from the Surface Transportation Board.

**UNDERTAKING
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served with the SAC complaint, governing the production of confidential documents in this SAC Proceeding, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to this Undertaking for any purposes other than the preparation and presentation of evidence and argument in this SAC Proceeding or any judicial review proceeding arising therefrom. I further agree not to disclose any confidential data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this SAC Proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this SAC Proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party, which asserts the confidential interest, shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated:

**UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] for _____, for which I am acting in this SAC Proceeding, I have read the Protective Order served with SAC complaint governing the production of confidential documents in this SAC Proceeding, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to the preparation and presentation of evidence and argument in this SAC Proceeding and any judicial review proceeding arising therefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that at the conclusion of this SAC Proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this SAC Proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the highly confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____