

BEFORE THE  
SURFACE TRANSPORTATION BOARD

|                                           |                                                                                         |
|-------------------------------------------|-----------------------------------------------------------------------------------------|
| <b>SANIMAX USA LLC,</b>                   |                                                                                         |
| <b>v.</b>                                 | <b>STB Docket No. NOR 42171</b>                                                         |
| <b>UNION PACIFIC RAILROAD<br/>COMPANY</b> | 304214<br>ENTERED<br>Office of Proceedings<br>April 4, 2022<br>Part of<br>Public Record |

UNION PACIFIC RAILROAD COMPANY'S  
REPLY EVIDENCE

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Exhibit 4, Sanimax USA LLC's Responses and Objections to Union Pacific Railroad  
Company's First Request for Production of Documents

Exhibit 5, Sanimax USA LLC's Responses and Objections to Union Pacific Railroad  
Company's First Set of Interrogatories

Sanimax bears the burden of proving that Union Pacific has violated its common carrier obligation under 49 U.S.C. § 11101 or engaged in an unreasonable practice in violation of 49 U.S.C. § 10702. Sanimax’s anecdotal evidence does not meet its burden of proof. To the contrary, the evidence in the record shows Union Pacific has fulfilled its statutory duties, and legal precedent supports that finding.

In its Opening Evidence, Sanimax USA LLC’s (“Sanimax”) makes inaccurate assertions that are directly contradicted by the evidence in the record—including the very exhibits Sanimax itself attaches to its Opening Evidence. Sanimax paints a picture of dramatic service failures by a “monopoly carrier” that are “disrupt[ing]” the “overall agri-food supply chain” and claims it “cannot simply find alternative rail service.”<sup>1</sup> In particular, Sanimax asserts—without citing any evidence—that since the lawsuit began, Union Pacific’s “‘miss rate’ ... has been 45% since it reduced its schedule.”<sup>2</sup> These claims are wrong and unsupported by evidence.

The evidence in the record shows that Union Pacific’s service to Sanimax has been consistently reasonable and reliable for the past two years—at 80% or higher early or on-time performance, including after Union Pacific implemented the three-days-per-week service. The evidence also shows that Union Pacific’s decision to reduce Sanimax’s service from five-days-per-week to three-days-per-week was for the sake of efficiency and entirely reasonable. That decision was based on Sanimax’s volumes, which averaged {     } carloads per week (and is now at     } average carloads per week)—volumes that do not justify five-days-per-week service given Union Pacific’s obligations to its other customers, many of which have much higher volumes and thus require more frequent service.<sup>3</sup> Importantly, the volume of

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<sup>1</sup> Sanimax USA LLC’s Opening Statement, *Sanimax USA LLC v. Union Pacific Railroad Company*, STB Docket No. NOR 42171, at 2, 10 (filed Mar. 2, 2022) (“Sanimax Opening Statement”).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> Union Pacific Railroad Company’s Motion to Dismiss, *Sanimax USA LLC v. Union Pacific Railroad Company*, STB Docket No. NOR 42171, at 1 (filed Nov. 30, 2020) (“UP Motion to Dismiss”).

carloads Union Pacific has moved for Sanimax since the three-days-per-week schedule went into effect has actually *increased*. This clearly demonstrates that Union Pacific’s goal behind the three-days-per-week schedule—increased efficiency for the entire network *and* for Sanimax—is being accomplished.

In addition, Union Pacific is not—as Sanimax asserts—a “monopoly carrier” merely because it is the only railroad that directly serves Sanimax.<sup>4</sup> The record evidence shows that Sanimax has alternative transportation options via trucking and transloading to other railroads and uses those alternative transportation options regularly. And Union Pacific’s service has never caused Sanimax’s South St. Paul facility to “shut down” nor has it “disrupted” “the overall agri-food supply chain.”<sup>5</sup> In fact, Sanimax conceded that the South St. Paul facility would *not* shut down with Union Pacific’s three-days-per-week service because Sanimax has alternative transportation options it can, and does, use.<sup>6</sup>

Union Pacific puts great care and attention into optimizing its network and seeks to satisfy all its customers to the greatest extent possible. But Union Pacific cannot meet a single customer’s demands at the expense of other customers on the network. Sanimax’s demand for five-days-per-week service for average weekly volumes of     } carloads is exceptional rather than reasonable. The record makes clear that the intent behind Sanimax’s demand for exceptional treatment is its desire for increased *profitability* (and increased market share over its rivals).

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Sanimax’s weekly carloads for the South St. Paul facility have not materially increased since UP implemented three-days-per-week service. *See* Ex. 3, Sanimax SSP DAS (3/7/2022 Updated) (showing     } average weekly cars placed in 2022 through March 7, 2022).

<sup>4</sup> Sanimax Opening Statement at 2, 4.

<sup>5</sup> *Id.* at 2, 10.

<sup>6</sup> *See, e.g., id.*, Second Verified Statement of Todd Strickler ¶¶ 8, 9 (“Strickler Second V.S.”). While Sanimax complains these alternatives are more expensive than UP’s competitive rates, Sanimax points to zero support that such a fact alone establishes an unreasonable practice or a violation of UP’s common carrier obligation. *See* Sanimax Opening Statement at 17.

Sanimax wants Union Pacific—its lowest cost transportation option—to dedicate an unjustifiably high portion of network resources to serve its facilities at the expense of other Union Pacific customers. For example, Sanimax states it “can obtain higher prices from certain customers for its finished goods when sold and delivered by rail” and indicates that Union Pacific’s rates are lower than Sanimax’s trucking or transloading options.<sup>7</sup> But Sanimax’s desire for lower-rate rail service cannot support a Board remedy prioritizing Sanimax’s extraordinary service demands over other customers with much higher volumes who truly require more frequent service.<sup>8</sup> Sanimax’s demand for five-days-per-week service is a *preference*—not a reasonable need.

A Board order prioritizing Sanimax’s preferences over the needs of higher-volume customers would contradict precedent and undermine the goals of the Rail Transportation Policy at 49 U.S.C. § 10101 by, *inter alia*, micromanaging Union Pacific’s operational decisions by regulatory fiat, decreasing network efficiency at the cost of other customers, and further stressing an already strained U.S. supply chain network. As the Board has previously held, a customer’s desire to increase profitability through greater service frequency is not a basis for relief.<sup>9</sup> The Board should conclude the same here and deny Sanimax’s requested relief in its entirety.

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<sup>7</sup> Sanimax Opening Statement at 7–8.

<sup>8</sup> See Decision, *Savannah Port Terminal Railroad, Inc.—Petition For Declaratory Order*, STB Finance Docket No. 34920 (STB served May 30, 2008) (“*Savannah Port Terminal*”), slip op. at 9 (“We understand why Capital wanted to continue receiving 3 switches per day regardless of the levels of overall traffic at the Port: Capital’s profitability hinged on its ability to unload 9 cars per day. But common carriers serve the public generally, and the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall. See De Bruce Grain Co., Inc. v. Union Pacific Railroad Company, STB Docket No. 42023 (STB served Dec. 22, 1997), and cases cited therein.”).

<sup>9</sup> See *id.*

## **I. UNION PACIFIC HAS SATISFIED ITS COMMON CARRIER OBLIGATION.**

To prove a violation of the common carrier obligation, “the [Complainant] must show that the carrier failed to provide service upon reasonable request.”<sup>10</sup> Sanimax has the burden of showing that Union Pacific failed to provide service upon reasonable request, entitling it to relief.<sup>11</sup> Sanimax has failed to meet that burden. In an attempt to show that Union Pacific has violated its common carrier obligation under 49 U.S.C. § 11101, Sanimax simply offers baseless assertions that, because Union Pacific has decreased the service schedule for the South St. Paul facility from five-days-per-week to three-days-per-week service, exacerbated by alleged “service failures” and Sanimax’s purported inability to access other transportation options, this decrease in service has threatened to “shut down” its South St. Paul facility and even “disrupt” the “overall agri-food supply chain.”<sup>12</sup> But the evidence shows otherwise. Moreover, Sanimax cannot point to any case law that supports its § 11101 claim. To the contrary, the law supports a finding that Union Pacific has satisfied its common carrier obligation to Sanimax.

### **A. The Evidence Shows Union Pacific Has Satisfied its Common Carrier Obligation**

Union Pacific has satisfied its common carrier obligation to Sanimax. First, with regard to service frequency, Union Pacific is carrying Sanimax’s traffic at a frequency appropriate for the South St. Paul facility’s low volumes—a mere } average carloads per week. Union Pacific made the decision to decrease the service frequency from five-days-per-week to three-days-per week only after careful consideration of Sanimax’s outbound volumes and Union Pacific’s track capacity.

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<sup>10</sup> Decision, *Meyer v. N. Coast R.R. Auth.*, STB Finance Docket No. 34337 (STB served Jan. 31, 2007) (“*Meyer*”), slip op. at 4.

<sup>11</sup> *Id.* (“A complainant has the burden of showing that it is entitled to relief.”).

<sup>12</sup> Sanimax Opening Statement at 2, 10, 16.

Other customers on Union Pacific’s network with higher volumes should have more access to the limited resources of Union Pacific’s network, particularly where Sanimax has multiple alternative transportation options.

Second, the record directly contradicts Sanimax’s suggestion that Union Pacific’s service at three-days-per-week threatens to “shut down” its South St. Paul facility or “cause raw material to rot.”<sup>13</sup> In its responses to Union Pacific’s First Set of Interrogatories, Sanimax admitted it has “not shut down, paused, or stopped operations as a result of Union Pacific’s service failure.”<sup>14</sup> The evidence shows that Sanimax trucks product in and out of its facility on a regular basis and has access to alternative and reliable rail service<sup>15</sup> such that Union Pacific’s service poses no risk to its South St. Paul facility or “the overall agri-food supply chain.”<sup>16</sup>

Third, Sanimax is not, as it claims, captive to a “monopoly carrier.”<sup>17</sup> The evidence shows it has multiple, alternative transportation options via trucking and trans-loading to other rail carriers that it regularly uses.<sup>18</sup>

Fourth, the record does not support Sanimax’s anecdotal claims about inadequate service. Rather, the evidence paints a very different picture. Union Pacific’s service since implementing three-days-per-week service for Sanimax’s South St.

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> Ex. 4, Sanimax USA LLC’s Responses and Objections to Union Pacific Railroad Company’s First Request for Production of Documents, *Sanimax USA LLC, v. Union Pacific Railroad Company*, STB Docket No. NOR 42171, at 7–8 (Response to Request No. 6) (filed Jan. 19, 2022).

<sup>15</sup> Ex. 5, Sanimax USA LLC’s Responses and Objections to Union Pacific Railroad Company’s First Set of Interrogatories, *Sanimax USA LLC v. Union Pacific Railroad Company*, STB Docket No. NOR 42171, at 10–11 (Response to Interrogatory No. 5) (filed Jan. 19, 2022) (“Sanimax Resp. to UP Interrog.”).

<sup>16</sup> Sanimax Opening Statement at 10.

<sup>17</sup> *Id.* at 2, 4.

<sup>18</sup> *See id.* at 9 (stating “Sanimax can obtain higher prices from certain customers ... when [its finished goods are] delivered by rail”); *id.*, Strickler Second V.S. ¶¶ 8, 9 (stating that Sanimax ships finished product to regional customers by truck and also transloads its finished goods to other rail carriers via “Sanimax or third-party trans-loading facilit[ies]”).

Paul facility has been at or above 80% early or on-time correct performance.<sup>19</sup> In the past 14 months, Union Pacific has exceeded 80% on-time performance in half of those months.<sup>20</sup> This level of service is consistent with Union Pacific’s service to the South St. Paul facility in 2020, which averaged 80.5% on-time or early performance, and in 2021, which averaged 83% on-time or early performance.<sup>21</sup> With regard to Union Pacific’s service thus far in 2022—far from Sanimax’s misleading figure of “50%” “miss rate” “in 2022,” Union Pacific’s performance has averaged 82% through March 7, 2022.<sup>22</sup>

Importantly, the data show that Union Pacific’s goal behind the three-days-per-week service schedule—increasing efficiency for the entire network *and* for Sanimax—is being realized. Prior to the August 3, 2020 service change, Union Pacific moved an average of { } carloads per month for Sanimax on a five-days-per-week service schedule.<sup>23</sup> After the service change in August 2020, Union Pacific moved an average of { } carloads per month.<sup>24</sup> In 2021, Union Pacific moved even more volume for Sanimax—an average of { } carloads per month.<sup>25</sup> These data indicate Sanimax is receiving *more* service overall from Union Pacific on its three-

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<sup>19</sup> See, e.g., Ex. 1, Sanimax SSP ISP 14-Month Average (3/7/2022 Updated); Ex. 2, Sanimax SSP ISP Breakout (3/7/2022 Updated).

<sup>20</sup> Ex. 1, Sanimax SSP ISP 14-Month Average (3/7/2022 Updated).

<sup>21</sup> See Ex. 2, Sanimax SSP ISP Breakout (3/7/2022 Updated); see also Sanimax Opening Statement, Ex. 3, UP\_000001.XLSX, Sheet 1 Tab.

<sup>22</sup> Sanimax Opening Statement at 1; Ex. 2, Sanimax SSP ISP Breakout (3/7/2022 Updated).

<sup>23</sup> See Sanimax Opening Statement, Ex. 3, UP\_000001.XLSX, Sheet 1 Tab (data for January through July 2020). Note, Sanimax’s average daily carload figure is based on DAS (day a week service) figures, which counts cars loaded that are spotted at the facility. The monthly carloads figure is based on IS&P (industry spot and pull) data, which is the number UP Operating uses and includes both spotted and loaded cars and the cars they pull. This means that IS&P data double counts the number of cars loaded so that operating can have a more reliable number of what is in the facility. The point of the IS&P data for purposes here, however, is that Sanimax is receiving more service overall from UP on its three-days-per-week schedule.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

days-per-week schedule. And, as noted above, the evidence shows Sanimax's service accuracy and on-time performance is also on par or better than it was on Sanimax's five-days-per-week schedule.<sup>26</sup> The data speak volumes: Union Pacific's decision to serve Sanimax's South St. Paul facility three days per week instead of five has increased the efficiency of its service, to the benefit of the entire network, the shipping public, and Sanimax itself.

Union Pacific has thoughtfully considered Sanimax's needs and has accommodated those needs to the maximum extent practicable considering the overall needs of the network. For example, after Sanimax informed Union Pacific that Sunday-Tuesday-Thursday service would be preferable to Monday-Wednesday-Friday service, Union Pacific accommodated that request.<sup>27</sup> Union Pacific has also provided the South St. Paul facility with a dedicated crew in an effort to better meet Sanimax's highly particularized operating requirements.<sup>28</sup> While Sanimax alleges it cannot operate under three-days-per-week service, Sanimax has, in fact, been operating under that schedule since August 3, 2020. And Sanimax may request special switches in the event there is a service issue or if additional service is needed beyond its regular Sunday-Tuesday-Thursday service.<sup>29</sup>

**B. Case Law Supports a Finding That Union Pacific Has Satisfied its Common Carrier Obligation.**

Sanimax's § 11101 claim is not supported by case law. As noted above, to prove a violation of the common carrier obligation ..., the [Complainant] must show

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<sup>26</sup> See, e.g., Ex. 1, Sanimax SSP ISP 14-Month Average (3/7/2022 Updated); Ex. 2, Sanimax SSP ISP Breakout (3/7/2022 Updated); Sanimax Opening Statement, Ex. 3, UP\_000001.XLSX, Sheet 1 Tab.

<sup>27</sup> UP Motion to Dismiss, Verified Statement of Emma Sethe ¶ 4 ("Sethe V.S.").

<sup>28</sup> *Id.* Most customers can do their own switching and spotting within their facilities to place cars in the customers' desired spots for loading and unloading. Sanimax, however, typically asks UP to perform these services for it. While UP works hard to perform these services accurately, it can be challenging for a railroad's local crew to spot individual cars within a facility precisely in accordance with the customer's specifications.

<sup>29</sup> See *id.* ¶¶ 3–5.

that the carrier failed to provide service upon reasonable request.”<sup>30</sup> Here, Union Pacific has never ceased service to Sanimax’s South St. Paul facility. The service schedule change from five-days-per-week to three-days-per-week is justified by the South St. Paul facility’s very low volumes (now { } average carloads per week) and by the needs and capacity of the broader network. As noted above, after the schedule change, Union Pacific has moved *more* carloads per month on average and maintained or improved its level of service—early or on-time performance at 80% or higher.

A carrier’s common carrier obligation cannot be based on a shipper’s subjective “idea” of adequate service or what it would prefer its service to be. Something more is required. Sanimax has not shown that “something more” here. In particular, § 11101 requires adequate service upon “reasonable” request. Sanimax’s demand for five-days-per-week service here, given its low volumes and utilization rate, is an *exceptional*, not a reasonable, request.

Because “common carriers serve the public generally, ... the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall.”<sup>31</sup> Reasonable limitations on service—analogueous to Union Pacific’s three-days-per-week service for the South St. Paul facility’s { } average carloads per week—have been found to be consistent with the common carrier obligations under § 11101.<sup>32</sup> Importantly, the common carrier obligation is

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<sup>30</sup> *Meyer* at 4.

<sup>31</sup> *Savannah Port Terminal* at 9.

<sup>32</sup> *See, e.g., Granite State Concrete Co. v. Surface Transp. Bd.*, 417 F.3d 85 (1st Cir. 2005) (railroad imposing a 4 a.m. to 1 p.m. operating window for other carrier to operate to shipper did not violate common carrier obligation); *Utah Transit Auth.—Acquisition Exemption—Line of Union Pac. R.R. Co.*, Finance Docket No. 32186, 1993 WL 112128 (ICC served Apr. 14, 1993) (finding that 5-hour, night-only operating window was adequate to meet the carrier’s common carrier obligation). *Cf., Nat’l Grain & Feed Ass’n v. Burlington N. R.R. Co.*, 8 I.C.C.2d 421, 427 (1992) (concluding the common carrier obligation only required a fleet size sufficient to meet *average* demand so as to avoid “a wasteful surplus” of equipment), *aff’d in part, rev’d in part, Nat’l Grain & Feed Ass’n v. United*

not absolute and does not equate to satisfying every aspect of a shipper's idiosyncratic demands so long as the service provided is reasonable.<sup>33</sup> In fact, prioritizing one shipper over all others has itself been found to be contrary to the public interest.<sup>34</sup>

This was the standard the Board applied in *Granite State*. It is a standard that supports Union Pacific's position here. In that case, the Board found no common carrier obligation where the carrier's restrictions on service times never "preclude[d] rail service" and the carrier "took steps to accommodate the shipper" once it learned of the shipper's needs.<sup>35</sup> This case is analogous to Union Pacific's actions here.

Moreover, the cases cited by Sanimax do not support its § 11101 claim. For example, Sanimax cites to *Bell Oil Terminal*,<sup>36</sup> but there, the Board merely acknowledged the *possibility* that frequency of service could be "relevant" for determining a carrier's common carrier obligation—nowhere did the Board state or imply that BNSF's reduction in service from three days per week to two days per week was improper.<sup>37</sup> Indeed, each of the cases cited by the Board in *Bell Oil Terminal* in which the Board "has entertained claims that curtailment of service

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*States*, 5 F.3d 306, 311 (8th Cir. 1993) ("We find that the Commission's ruling regarding fleet size is a permissible construction of the statute.").

<sup>33</sup> *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981) ("[T]he law 'exacts only what is reasonable of the railroads under the existing circumstances.'"); see *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 531 n.4 (6th Cir. 2002) ("Pursuant to 49 U.S.C. § 11101(a), railroads, as common carriers, have an obligation to provide rail service upon reasonable request, but 'the common carrier obligation is not absolute.'").

<sup>34</sup> *DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998) (affirming STB decision denying shipper request for injunctive relief because it would have prioritized that shipper over all others and therefore was contrary to the public interest).

<sup>35</sup> *Granite State*, 417 F.3d at 91, 93–94, 96.

<sup>36</sup> Sanimax Opening Statement at 12.

<sup>37</sup> Decision, *Bell Oil Terminal, Inc. v. BNSF Railway Co.*, STB Docket No. NOR 42169 (STB served Dec. 23, 2020), slip op. at 4.

amounted to violations of the common carrier obligation and/or the requirements that carriers establish reasonable rules and practices”<sup>38</sup> is distinguishable.

For example, in *Central Valley Ag Grinding*, the parties settled the dispute before the Board issued any decision on the merits, but the facts of that case are also distinguishable. There, the rail carrier allegedly severely restricted the customer’s service via conditions, accessorial fees, and prepayment requirements that had the effect of blocking “virtually all” of the customer’s usual access.<sup>39</sup> The actions by the carrier in *Central Valley Ag Grinding* are not, as Sanimax asserts, “similar in principle to the situation at South St. Paul.”<sup>40</sup> Union Pacific has not severely restricted Sanimax’s service such that “virtually all” of its usual access “has ceased.”<sup>41</sup> Nor has Union Pacific limited Sanimax’s access to Union Pacific’s tracks or imposed new accessorial fees or prepayment requirements.

Importantly, the reason and intent behind Union Pacific’s decision to implement a three-days-per-week service schedule for the South St. Paul facility are wholly distinguishable from the situation in *Central Valley Ag Grinding*. There, the Board preliminarily found there was no reasonable basis for the carrier’s “prepayment demands and conditions” because the customer had no “past payment performance” issues, and “the implementation and timing of” the carrier’s conditions “raise[d] questions” in light of the pending state litigation between the parties.<sup>42</sup> The facts are entirely different here. Union Pacific reduced the frequency of service to the South St. Paul facility in order to increase the efficiency of Union Pacific’s network to the benefit of all customers on Union Pacific’s network,

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<sup>38</sup> *Id.* at 3, n.6.

<sup>39</sup> *Central Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co.*, STB Docket No. NOR 42159 (STB served June 12, 2018) (“*Central Valley Ag Grinding*”), slip op. at 5.

<sup>40</sup> Sanimax Opening Statement at 13.

<sup>41</sup> *Central Valley Ag Grinding*, at 5.

<sup>42</sup> *Id.* at 2–3, 5.

including *Sanimax itself*—an entirely reasonable purpose that the service change is, in fact, accomplishing.<sup>43</sup>

Sanimax also points to *Interstate Commerce Commission v. Chesapeake & Ohio Railway Co.*, 438 F. Supp. 666, 666–68 (W.D. Mich. 1977) (“*Chesapeake & Ohio*”), arguing that it stands for the proposition that a mere service level reduction “in and of itself” can “violate a common carrier obligation.”<sup>44</sup> However, Sanimax misleads the Board on the ruling of that case. In *Chesapeake & Ohio*, individual water ferry passengers were refused service entirely (and there is no indication the passengers had an alternative option).<sup>45</sup> Those facts stand in sharp contrast to the present case. Union Pacific has provided consistent service to Sanimax, has provided Sanimax with special switches when additional service is needed, and Sanimax has alternative transportation options it routinely uses.<sup>46</sup>

In addition, the district court in *Chesapeake & Ohio* required the water ferry to offer service via a third ferry only temporarily—during August and September, the months of greatest demand—but then allowed the water ferry to return to its two-vessel service.<sup>47</sup> By contrast here, Sanimax does not tie any of its claims to higher levels of demand but, rather, is asking for a permanent increase to its service frequency despite very low volumes that do not justify the increase. In addition, the water ferry company in *Chesapeake & Ohio* was in the red and seeking to reduce

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<sup>43</sup> See, *supra*, § I.A; Sethe V.S. ¶ 3.

<sup>44</sup> Sanimax Opening Statement at 12.

<sup>45</sup> *Interstate Commerce Comm’n v. Chesapeake & Ohio Ry. Co.*, 438 F. Supp. 666, 666–68 (W.D. Mich. 1977) (“*Chesapeake & Ohio*”).

<sup>46</sup> Likewise, in *Louisiana Railcar*, see Sanimax Opening Statement at 13, the carrier completely ceased service altogether via an unreasonable embargo, and there was no evidence the shipper had any alternative transportation options. *Louisiana Railcar, Inc. v. Mo. Pac. R.R. Co.*, 5 I.C.C. 2d 542 (1989). Here, Sanimax receives regular service appropriate for its volume and utilization rate, with access to special switches, and Sanimax has and uses several alternative transportation options.

<sup>47</sup> *Chesapeake & Ohio*, 438 F. Supp. at 666–68.

service for that reason.<sup>48</sup> By contrast, Union Pacific changed Sanimax’s service schedule for the sake of increasing the efficiency of its network for the benefit of all its customers, including Sanimax.

In fact, *Chesapeake & Ohio* suggests Union Pacific’s service performance to Sanimax *does* satisfy its common carrier obligation. The district court noted it had found, in a prior decision, that two-vessel service at a non-peak time at 80% on-time performance satisfied the water carrier’s common carrier obligation.<sup>49</sup> Because Union Pacific is offering service sufficient for Sanimax’s volumes—and offers Sanimax special switches for unexpected times when more service is needed—the Board should conclude that Union Pacific’s 80% or higher on-time service performance for the South St. Paul facility easily satisfies Union Pacific’s common carrier obligation.

## II. UNION PACIFIC HAS NOT ENGAGED IN ANY UNREASONABLE PRACTICE.

For claims under § 10702, “[t]he agency has developed no single test for judging whether a particular practice is unreasonable, leaving that fact-specific inquiry to a case-by-case analysis.”<sup>50</sup> Still, Sanimax has the burden of proffering evidence that establishes an unreasonable practice. It has failed to do so here.

Sanimax’s unreasonable practices claim is based on its assertions of Union Pacific’s purported service failures. However, all of its assertions in that regard are unsupported, inaccurate, directly contradicted by record evidence, or highly misleading. For example, Sanimax asserts that, since some point in 2020,<sup>51</sup> “UP’s

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 666–67.

<sup>50</sup> Decision, *WTL Rail Corp.—Petition for Declaratory Order and Interim Relief*, STB Docket No. 42092 (STB served Feb. 17, 2006) (“*WTL Rail Corp.*”), slip op. at 6.

<sup>51</sup> Sanimax states this figure purportedly relates to UP’s service “since this lawsuit began,” which would be November 6, 2020, Sanimax Opening Statement at 1, but at another place in its brief, this

‘miss rate’ (late arrival + no arrival + misplaced cars) has been 45%.”<sup>52</sup> But Sanimax cites *nothing* to support this assertion, because there is no evidence to support it. In fact, this assertion does not align even with Sanimax’s *own* exhibits or data. In particular, Exhibit 11 to Sanimax’s Opening Statement shows that, according to Sanimax’s *own* data, Union Pacific provided on-time and correct service at 76% in 2020 and 78% in 2021.<sup>53</sup> While Union Pacific disputes the accuracy of Sanimax’s data in Exhibit 11, Sanimax’s data are not far from Union Pacific’s data, which show Union Pacific provided on-time and correct service to Sanimax 80% in 2020 and 82% in 2021. In fact, Sanimax itself concedes this point in its Opening Statement!<sup>54</sup>

Sanimax also paints a misleading picture when it states that “UP’s miss rate is up to almost 50%” in “2022.”<sup>55</sup> What Sanimax does not reveal is that this figure is based on a span of a mere *eleven* service days in the dead of winter in January 2022. The Board should disregard this misleading figure, which does not offer any sense of Union Pacific’s overall performance in 2022. As discussed above, Union Pacific’s service in 2022 has been at a level consistent with its 80%-or-higher level of early or on-time performance since 2020. In fact, Union Pacific has not only maintained or improved its level of service since the service change, it has also moved *more* carloads per month on average since the service change began.<sup>56</sup>

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figure purportedly relates to UP’s service “since it reduced [Sanimax’s] schedule,” which was August 3, 2020, *id.* at 7.

<sup>52</sup> *Id.* at 7. It is worth noting that “late arrival” should not be deemed improper service. Railroads cannot operate on precise time frames given the many network variables and externalities railroads must operate within and around.

<sup>53</sup> *See id.*, Ex. 11, SANIMAX\_UP\_STB-0000011.XLSX, Svc Correct Chart Tab.

<sup>54</sup> *Id.* at 7 (conceding that UP “provided on time service to Sanimax ... 80% of the time for all of 2020 and 82% of the time in 2021” (citing their Ex. 3, UP\_000001.XLSX)).

<sup>55</sup> *Id.* at 1.

<sup>56</sup> *See supra*, § I.A.

While there is no defined standard or test for determining whether a carrier practice is or is not reasonable,<sup>57</sup> the Board’s fact-specific inquiry must still be based on the evidence in the record. Here, Sanimax’s own Exhibit 3 to its Opening Statement shows that, in 2021 (after implementing the three-days-per-week service change), Union Pacific provided Sanimax with on time or early service 84% of the time—and that was during a global pandemic with supply chain complications. There is no precedent, and there is no valid reason, to support a finding that rail carrier service provided at these levels is an unreasonable practice under § 10702.

In addition, Sanimax fails to prove the service issues of which it complains were Union Pacific’s fault. The D.C. Circuit has explained that “neither this court nor the STB has adopted a presumption ... that variations in train service are the fault of the railroad or that the railroad should necessarily bear their costs.”<sup>58</sup> There are a multitude of reasons Union Pacific’s service might have suffered, and many of those reasons are often outside of Union Pacific’s control. Without knowing *why* these service issues occurred, Sanimax has not carried its burden in the first instance, because there is no way to know whether any service issues were in fact “unreasonable” when fault is unknown. *See Aluminum Co. of Am. v. St. Louis-S.F. Ry. Co.*, 364 I.C.C. 137, 143 (1980) (“Placing the burden on the complaining shipper is consistent with the Commission’s general rule that the complainant has the burden to show that a practice is ‘unreasonable’ under section 10702.”); *see also Dana Corp. v. ICC*, 703 F.2d 1297, 1305 (D.C. Cir. 1983) (“the STB reasonably

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<sup>57</sup> *See WTL Rail Corp.*, at 6 (“The statute does not specifically define what constitutes an unreasonable practice. Rather, in view of the wide variety of situations that might arise, Congress has committed such determinations to the Board. The agency has developed no single test for judging whether a particular practice is unreasonable, leaving that fact-specific inquiry to a case-by-case analysis.”).

<sup>58</sup> *North Am. Freight Car Ass’n v. Surface Transp. Bd.*, 529 F.3d 1166, 1173 (D.C. Cir. 2008).

concluded that NAFCA did not meet its burden because it offered no evidence that particular variations in service were BNSF's fault").<sup>59</sup>

Ultimately, the evidence in the record here affirmatively establishes that Union Pacific's service to Sanimax does not constitute an unreasonable practice under § 10702. Union Pacific's on-time or early performance is and has been at or above 80% for more than two years; Sanimax's three-days-per-week service schedule is more than sufficient to handle Sanimax's average weekly carload volume of     ; Sanimax is able to request special switches when more service is needed; and Sanimax not only has alternative transportation options it uses, it has dedicated lanes and equipment at its facility for loading at least 11 trucks per week, and its average of

}.<sup>60</sup> As discussed above, there simply is no evidence to support that Union Pacific is a "monopoly carrier," as Sanimax asserts, or that Union Pacific is doing anything other than optimizing its network by ensuring the most efficient use of its resources while doing its best to accommodate Sanimax's needs.<sup>61</sup>

In an ideal world, Union Pacific would accommodate every customer's preferences, but that is not possible given the limitations of network railroading. Railroads face a host of externalities and variables outside of their control—e.g.,

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<sup>59</sup> Nor does it matter here that Sanimax has invested in its rail facilities at the South St. Paul facility. *See* Opening Statement at 16. That might matter if UP had ceased all service completely, leaving Sanimax with no use for its rail facilities. Instead, UP continues to regularly serve the South St. Paul facility three days per week (and offers special switches when needed). In fact, as discussed *supra*, UP has actually moved *more* railcars on average monthly from the South St. Paul facility since implementing the three-days-per-week service than when it served the facility five days per week. In addition, Sanimax has admitted that its investment in its rail facilities "continues to this day" despite UP's three-days-per-week service. *See* Ex. 5, Sanimax Resp. to UP Interrog. at 5 (Resp. to Interrogatory No. 2) ("Sanimax is proposing an additional investment at the South St. Paul facility ... to accommodate more efficient loading of finished goods to a railcar for transportation."). Thus, there is no basis for finding that Sanimax has somehow lost the value of its rail facility investments due to UP's frequency of service.

<sup>60</sup> *See* UP Motion to Dismiss at 1; Verified Complaint, *Sanimax USA LLC v. Union Pacific Railroad Company*, STB Docket No. NOR 42171 (filed Nov. 6, 2020), Attachment No. 4.

<sup>61</sup> *See supra* § I.

weather, mechanical problems, capacity limits, and delays due to other railroad or customer activity on the network—that require flexibility and inevitably result in service variability, delays, and disruptions. As the Board knows, railroads in particular must manage a highly complex and interconnected network for the benefit of a multitude of diverse customers—many of whom prefer service frequencies that conflict given the limited resources of the network. Just like any business, Union Pacific must allocate its resources wisely to benefit all of its customers, not just one. Union Pacific’s decision to reduce service to the South St. Paul facility to better accord with that facility’s specific utilization safeguards the health of its overall network. Indeed, “given the many variables outside a railroad’s control that may affect delivery ... a railroad cannot reasonably be expected always to be able to meet an ideal delivery timetable.”<sup>62</sup> Yet that is precisely what Sanimax demands here.

The Board should recognize that Union Pacific is not engaging in an unreasonable practice when it right-sizes service schedules to eliminate waste or when it refrains from acquiescing to demands for exceptional service at the expense of the network. Sanimax has been scheduled for three-days-per-week service since August 2020, and, since then, its operations have never shut down due to rail service. It has options for extra switches and trucking service. Given Sanimax’s assertions about the particular nature of its operations, Sanimax should be encouraged to consider ways in which it can build resiliency into its operating model to account for the potential errors and inevitable and unexpected delays inherent in railroad shipping. While Union Pacific works every day to limit errors and delays, it simply cannot (and is not required to) operate at the level of precision and frequency Sanimax demands here.

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<sup>62</sup> Decision, *Capitol Materials, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Railway Co.*, STB Docket No. 42068 (STB served Apr. 12, 2004), slip op. at 7.

### III. SANIMAX IS NOT ENTITLED TO RELIEF.

Sanimax has not carried its burden of proof in this matter. Granting any relief to Sanimax in this proceeding would be unsupported by both precedent and the record and would also be poor public policy.

#### A. Granting Relief Here Would Undermine the Rail Transportation Policy.

Sanimax claims that a Board order requiring Union Pacific to provide the South St. Paul facility five-days-per-week service (for an average of     } carloads weekly) would further the Rail Transportation Policy at 49 U.S.C. 10101.<sup>63</sup> This claim is incorrect.

The Rail Transportation Policy emphasizes the Board's charge to minimize regulatory control absent violations of the statute by carriers, and Union Pacific has shown above that it has not violated the statute. If the Board grants Sanimax relief in this proceeding, it would be maximizing regulatory control without justification (as well as incentivizing mere disgruntled customers to seek the "friendlier" "regulators' hands" over the "invisible" market forces that maintain the health of the U.S. freight rail industry).<sup>64</sup> This would be directly contrary to § 10101(2) (minimizing regulatory control).

Granting Sanimax a remedy would also undermine § 10101(4) (ensuring a sound and competitive rail system that meets the needs of the public) because it would require Union Pacific to cater to a single customer's mere preferences at the expense of other customers on the network, many of whom have higher volumes and thus a greater need for network capacity and service frequency. The Board has already established that this type of special treatment is "contrary to the public interest."<sup>65</sup>

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<sup>63</sup> Sanimax Opening Statement at 11, n.12.

<sup>64</sup> *Ass'n of Am. R.R.s. v. Surface Transp. Bd.*, 306 F.3d 1108, 1111 (D.C. Cir. 2002).

<sup>65</sup> *DeBruce Grain*, 149 F.3d at 789.

### **B. Granting Relief Would Stress an Already Strained Supply Chain.**

If customers with very small volumes like Sanimax were able to obtain Board intervention that forces a carrier to provide a frequency of service unjustified by their volumes, other customers on the network would suffer, and the efficiency and fluidity of the entire network would be harmed. As supply chain stakeholders have learned since the global COVID-19 pandemic, efficiency and fluidity are crucial to supporting the health of the national supply chain. Granting Sanimax a remedy that would further stress the already stressed North American supply chain is the last thing shippers and the American public need and is contrary to the Executive Order Sanimax cites, which recognizes the importance of reliable and resilient supply chains with fewer disruptions.<sup>66</sup>

Far from resolving supply chain disruptions, increasing the service frequency to shippers like Sanimax with very low volumes would pull resources away from customers with higher volumes who need more capacity and undermine Union Pacific's ability to manage its network to ensure service works for *all* of its customers. A strong service product for all customers is Union Pacific's goal in reducing Sanimax's service frequency due to low volumes. That reduction (and UP's 80% or better on-time or early performance) is neither a violation of Union Pacific's common carrier obligation nor an unreasonable practice.

## **IV. CONCLUSION**

For the reasons stated above, Union Pacific has satisfied and continues to satisfy its common carrier obligation to Sanimax and has not engaged in an unreasonable practice. The Board should deny Sanimax's requested relief in its entirety.

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<sup>66</sup> Exec. Order No. 14017, 86 Fed. Reg. 11849 (Feb. 24, 2021); *see* Sanimax Opening Statement at 9.

Respectfully submitted,

/s/ Raymond Atkins

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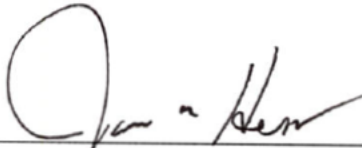
*Counsel for Union Pacific Railroad Company*

April 1, 2022

VERIFICATION OF PLEADING

I, Jason M. Hess, declare under penalty of perjury that the facts in the foregoing are true and correct. Further, I certify that I am qualified and authorized to file this verification.

Executed on this 1st day of April 2022.

  
A handwritten signature in black ink, appearing to read "Jason M. Hess", is written over a horizontal line.

Jason M. Hess  
Vice President, Marketing & Sales  
Union Pacific Railroad Company

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of April 2022, I caused a copy of the foregoing document to be served electronically and by first-class mail, postage prepaid, on the following parties of record.

Richard F. Riley, Jr.  
David T. Ralston, Jr.  
R. Nicholas Englund  
Foley & Lardner LLP  
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Washington, D .C. 20007-5109

Timothy J. Strafford  
Association of American Railroads  
425 3rd Street SW  
Suite 1000  
Washington, DC 20024

/s/ Morgan B. Lindsay  
Morgan B. Lindsay

# **Exhibit 1**

**Sanimax SSP ISP 14-Month Average  
(3/7/2022 Updated)**

**Withheld as Containing  
Confidential  
Information**

# **Exhibit 2**

**Sanimax SSP ISP Breakout (3/7/2022  
Updated)**

**Withheld as Containing  
Confidential  
Information**

# **Exhibit 3**

**Sanimax SSP DAS (3/7/2022 Updated)**

**Withheld as Containing  
Confidential  
Information**

# **Exhibit 4**

**Sanimax USA LLC's Responses and  
Objections to Union Pacific Railroad  
Company's First Request for  
Production of Documents**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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|                                 |   |                      |
|---------------------------------|---|----------------------|
| Sanimax USA LLC,                | ) |                      |
|                                 | ) | DOCKET NO. NOR 42171 |
| Complainant,                    | ) |                      |
|                                 | ) |                      |
| v.                              | ) |                      |
|                                 | ) |                      |
| Union Pacific Railroad Company, | ) |                      |
|                                 | ) |                      |
| Defendant.                      | ) |                      |

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**SANIMAX USA LLC’S RESPONSES AND OBJECTIONS TO UNION PACIFIC  
RAILROAD COMPANY’S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

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Pursuant to 49 C.F.R. § 1114.30, Complainant Sanimax USA LLC (“Sanimax”), by its undersigned attorneys, hereby responds and objects to the First Request for Production of Documents (“Requests”) of Union Pacific Railroad Company (“UP”).

**GENERAL OBJECTIONS**

Sanimax makes the following general objections to UP’s Requests, which apply to each Request regardless of whether the general objections are specifically incorporated by reference into the specific objections below.

1. Sanimax objects to UP’s Requests and definitions and instructions therein, to the extent they seek to impose any requirement or discovery obligation on Sanimax greater or different than those imposed by the applicable Rules of Practice of the Surface Transportation Board and any other agreements concerning discovery between the parties.

2. Sanimax objects to UP's Requests to the extent they seek information or documents that are protected or immune from production by the attorney-client privilege, attorney-work product doctrine, joint defense privilege, common-interest privilege, or any other applicable doctrine or privilege. Inadvertent disclosure of such document(s) shall not constitute a waiver of any such privilege, doctrine, or immunity, with respect to the specific document disclosed or the subject matter thereof and information therein, and shall not waive Sanimax's right to object to the use of any such document or information. All such documents shall be returned to Sanimax counsel immediately.

3. Sanimax objects to UP's Requests and the definitions and instructions contained there to the extent they contain terminology that is vague, ambiguous, or not defined in an understandable manner. Sanimax will interpret the terms or phrases used in such requests in a manner understood by Sanimax.

4. Sanimax objects to UP's Requests and the definitions and instructions contained therein to the extent they seek confidential, proprietary, commercial sensitive information, and/or trade secrets.

5. Sanimax objects to UP's Requests and the definitions and instructions contained therein to the extent they seek documents that are not in Sanimax's possession, custody, or control, or to the extent they call for Sanimax to prepare documents and/or things that do not already exist. Sanimax will only produce documents in its possession, custody, or control.

6. Sanimax objects to UP's Requests and the definitions and instructions contained therein to the extent they seek documents readily available from other sources that are more convenient, less burdensome, less expensive, or more readily available to UP than to Sanimax.

7. Sanimax objects to each Request to the extent that it seeks documents from a time period that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

8. Sanimax objects to each Request as overly broad, unduly burdensome, and oppressive, to the extent that it requests documents or things that are neither relevant to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence.

9. Sanimax objects to each Request, and each and every instruction and definition therein, as overly broad, unduly burdensome, and oppressive, to the extent that they are not proportional to the needs of the case due to the breadth of the requested information and/or documents.

10. By stating in these responses that Sanimax will produce documents, Sanimax does not represent that any responsive documents or things actually exist; rather, Sanimax is making, and will continue to make, a reasonable, good faith search and attempt to ascertain whether responsive documents or things do exist.

11. Sanimax objects to the definition of “all” or “any” as overly broad, unduly burdensome, and oppressive, to the extent it imposes discovery obligations that are not proportional to the needs of the case or reasonably calculated to lead to the discovery of admissible evidence.

12. Sanimax objects to the definition of “Relating to” as overly broad, unduly burdensome, oppressive, and fails to provide a meaningful limit on the request.

13. Sanimax objects to the definition of “Document” as vague, overly broad, unduly burdensome, and oppressive, to the extent it exceeds the scope and/or requirements of Rule 34 of

the Federal Rules of Civil Procedure and, when read in connection with the individual Requests, seeks information or documents not reasonably calculated to lead to admissible evidence.

14. Sanimax objects to the definition of “Alternative Transportation” as overly broad, unduly burdensome, and oppressive, to the extent it imposes discovery obligations that are not proportional to the needs of the case or reasonably calculated to lead to the discovery of admissible evidence.

15. Any documents provided in response to any Request should not be construed as an admission or stipulation that the content or subject matter is relevant, a waiver by Sanimax of its General Objections or Specific Objections asserted in answer to an Interrogatory, or an agreement that requests for similar information will be treated in a similar manner. Sanimax reserves the right to object on any ground to the use of its responses in this proceeding or in any subsequent appeal, proceeding, action, or trial.

16. Sanimax reserves the right to amend or supplement its General Objections.

### **RESPONSE TO REQUESTS**

#### **REQUEST NO. 1:**

All Documents and Communications relating to any and all Alternative Transportation services provided to Sanimax’s South St. Paul Facility sufficient to show for each shipment: the date of shipment, the origin or destination, the transportation service provider, the type of transportation service (e.g., truck, rail, intermodal, etc.), the cost to Sanimax for the shipment (if any), and the payment by Sanimax for the shipment (if any).

#### **RESPONSE TO REQUEST NO. 1:**

In addition to its General Objections, Sanimax objects to this Request as overbroad and unduly burdensome because it seeks information not reasonably calculated to lead to admissible evidence, particularly as it relates to All Documents and Communications that relate to the subject matter of this Request. The definition of “Alternative Transportation” extends beyond outbound service that replaces intended or scheduled outbound rail service that required

alternative outbound transportation due to UP's failure to provide adequate service. Sanimax further objects to this Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege.

Subject to and without waiving any of its General and Specific Objections, Sanimax will produce documents responsive to this Request.

**REQUEST NO. 2:**

All Documents and Communications relating to, or supporting, any damages or remedies that Sanimax is seeking in this proceeding against UP.

**RESPONSE TO REQUEST NO. 2:**

In addition to its General Objections, Sanimax objects to this Request as overbroad and unduly burdensome because it seeks information not reasonably calculated to lead to admissible evidence, particularly as it relates to All Documents and Communications that relate to the subject matter of this Request. Sanimax further objects to this Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege.

Subject to and without waiving any of its General and Specific Objections, Sanimax will produce documents responsive to this Request.

**REQUEST NO. 3:**

Site or facility maps of the South St. Paul Facility that are sufficient to show all buildings, facilities, infrastructure, and areas that are used in any transportation of products or materials to or from the South St. Paul Facility, including UP rail transportation and Alternative Transportation.

**RESPONSE TO REQUEST NO. 3:**

In addition to its General Objections, Sanimax objects to this Request as overbroad and unduly burdensome because it seeks information not reasonably calculated to lead to admissible

evidence, particularly as the definition of “Alternative Transportation” extends beyond outbound service that replaces intended or scheduled outbound rail service that required alternative outbound transportation due to UP’s failure to provide adequate service. Sanimax further objects to this Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege.

Subject to and without waiving any of its General and Specific Objections, Sanimax will produce documents responsive to this Request.

**REQUEST NO. 4:**

All Documents and Communications relating to any and all investments, actual or planned, in the buildings, facilities, and/or infrastructure used in any transportation of products or materials to or from of the South St. Paul Facility.

**RESPONSE TO REQUEST NO. 4:**

In addition to its General Objections, Sanimax objects to this Request as overbroad and unduly burdensome because it seeks information not reasonably calculated to lead to admissible evidence, particularly as it relates to All Documents and Communications that relate to the subject matter of this Request. Sanimax further objects to this Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege.

Subject to and without waiving any of its General and Specific Objections, Sanimax will produce documents responsive to this Request.

**REQUEST NO. 5:**

Produce all Documents and Communications related to any capital investments that Sanimax has made at the South St. Paul Facility to support rail transportation or truck transportation of inbound or outbound materials.

**RESPONSE TO REQUEST NO. 5:**

In addition to its General Objections, Sanimax objects to this Request as overbroad and unduly burdensome because it seeks information not reasonably calculated to lead to admissible evidence, particularly as it relates to all Documents and Communications that relate to the subject matter of this Request. Sanimax further objects to this Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege.

Subject to and without waiving any of its General and Specific Objections, Sanimax will produce documents responsive to this Request.

**REQUEST NO. 6:**

Produce all Documents and Communications related to all instances when Sanimax has shut down, paused, or stopped operations (“Shut Down”) at the South St. Paul Facility.

**RESPONSE TO REQUEST NO. 6:**

In addition to its General Objections, Sanimax objects to this Request as overbroad and unduly burdensome because it seeks information not reasonably calculated to lead to admissible evidence, particularly as it relates to all Documents and Communications that relate to the subject matter of this Request. Sanimax further objects to this Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Additionally, Sanimax objects to this Request as overbroad, unduly burdensome, and oppressive, to the extent that documents or information relating to “all instances when Sanimax has shut down, paused, or stopped operations” are not relevant to any party’s claims or defenses in this matter and are not reasonably calculated to lead to admissible evidence.

Subject to and without waiving any of its General and Specific Objections, Sanimax states that it has not shut down, paused, or stopped operations as a result of UP's service failures.

**REQUEST NO. 7:**

Produce all Documents identified, referenced, or relied upon in Sanimax's responses to Union Pacific's interrogatories in this proceeding.

**RESPONSE TO REQUEST NO. 7:**

In addition to its General Objections, Sanimax objects to this Request as overbroad and unduly burdensome because it seeks information not reasonably calculated to lead to admissible evidence. Sanimax further objects to this Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Additionally, Sanimax objects to this Request to the extent it is duplicative and cumulative of other Requests.

Subject to and without waiving any of its General and Specific Objections, Sanimax will produce documents responsive to this Request.

Respectfully submitted,

Date filed: January 19, 2022

/s/ Richard F. Riley, Jr.

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Attorneys for Complainant

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2022, I served the foregoing Responses and Objections to Requests for Production by email and first class mail on Union Pacific's attorneys at the following addresses:

Raymond A. Atkins, Esq.  
Matthew J. Warren, Esq.  
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/s/ Richard F. Riley, Jr.

Richard F. Riley, Jr.

# **Exhibit 5**

## **Sanimax USA LLC's Responses and Objections to Union Pacific Railroad Company's First Set of Interrogatories**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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|                                 |   |                      |
|---------------------------------|---|----------------------|
| Sanimax USA LLC,                | ) |                      |
|                                 | ) | DOCKET NO. NOR 42171 |
| Complainant,                    | ) |                      |
|                                 | ) |                      |
| v.                              | ) |                      |
|                                 | ) |                      |
| Union Pacific Railroad Company, | ) |                      |
|                                 | ) |                      |
| Defendant.                      | ) |                      |

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**SANIMAX USA LLC’S RESPONSES AND OBJECTIONS TO UNION PACIFIC  
RAILROAD COMPANY’S FIRST SET OF INTERROGATORIES**

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Pursuant to 49 C.F.R. § 1114.26, Complainant Sanimax USA LLC (“Sanimax”), by its undersigned attorneys, hereby responds and objects to the First Set of Interrogatories (“Interrogatories”) of Union Pacific Railroad Company (“UP”).

**GENERAL OBJECTIONS**

Sanimax makes the following general objections to UP’s Interrogatories, which apply to each Interrogatory regardless of whether the general objections are specifically incorporated by reference into the specific objections below.

1. Sanimax objects to UP’s Interrogatories and definitions and instructions therein, to the extent they seek to impose any requirement or discovery obligation on Sanimax greater or different than those imposed by the applicable Rules of Practice of the Surface Transportation Board and any other agreements concerning discovery between the parties.

## **PUBLIC VERSION**

2. Sanimax objects to UP's Interrogatories to the extent they seek information or documents that are protected or immune from production by the attorney-client privilege, attorney-work product doctrine, joint defense privilege, common-interest privilege, or any other applicable doctrine or privilege. Inadvertent disclosure of such document(s) and/or information shall not constitute a waiver of any such privilege, doctrine, or immunity, with respect to the specific document disclosed or the subject matter thereof and information therein, and shall not waive Sanimax's right to object to the use of any such document or information. All such documents shall be returned to Sanimax counsel immediately.

3. Sanimax objects to UP's Interrogatories and the definitions and instructions contained there to the extent they contain terminology that is vague, ambiguous, or not defined in an understandable manner. Sanimax will interpret the terms or phrases used in such requests in a manner understood by Sanimax.

4. Sanimax objects to UP's Interrogatories and the definitions and instructions contained therein to the extent they seek confidential, proprietary, commercial sensitive information, and/or trade secrets.

5. Sanimax objects to each Interrogatory as overly broad, unduly burdensome, and oppressive, to the extent that it requests information that is neither relevant to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence.

6. Sanimax objects to the definition of "all" or "any" as overly broad, unduly burdensome, and oppressive, to the extent it imposes discovery obligations that are not proportional to the needs of the case or reasonably calculated to lead to the discovery of admissible evidence.

## **PUBLIC VERSION**

7. Sanimax objects to the definition of “document” as vague, overly broad, unduly burdensome, and oppressive, to the extent it exceeds the scope and/or requirements of Rule 34 of the Federal Rules of Civil Procedure and, when read in connection with the individual Interrogatories, seeks information or documents not reasonably calculated to lead to admissible evidence.

8. Sanimax objects to the definition of the terms “describe in detail” and “set forth” as overly board and unduly burdensome to the extent they impose discovery obligations that are inconsistent with Sanimax’s ability to produce business records pursuant to 49 CFR § 1114.26(b).

9. Sanimax objects to the definitions of the terms “state” and “identify” as overly broad, unduly burdensome, and oppressive to the extent that they impose an obligation upon Sanimax that exceeds the obligations imposed by the Rules of Practice of the Surface Transportation Board; to the extent such definitions, when read in connection with the individual Interrogatories, seeks information or documents no reasonably calculated to lead to admissible evidence; and to the extent such definitions, when read in connection with the individual Interrogatories, seeks information or documents not within Sanimax’s possession, custody, or control.

10. Any information provided in response to any Interrogatory should not be construed as an admission or stipulation that the content or subject matter is relevant, a waiver by Sanimax of its General Objections or Specific Objections asserted in answer to an Interrogatory, or an agreement that requests for similar information will be treated in a similar manner. Sanimax reserves the right to object on any ground to the use of its responses in this proceeding or in any subsequent appeal, proceeding, action, or trial.

11. Sanimax reserves the right to amend or supplement its General Objections.

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**RESPONSE TO INTERROGATORIES**

**INTERROGATORY NO. 1:**

Identify and describe with specificity the damages Sanimax is seeking in the above-referenced proceeding against UP and all bases and support for the damages sought.

**RESPONSE TO INTERROGATORY NO. 1:**

In addition to its General Objections, Sanimax objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Additionally, Sanimax objects to this Interrogatory to the extent it is duplicative and cumulative of other Interrogatories.

Subject to and without waiving Sanimax's General and Specific Objections, Sanimax states: Sanimax incorporates its response to UP's Interrogatory No. 5 by reference as if fully set forth herein. Sanimax further states that it has incurred a variety of increased costs and fees as a result of UP's failure to provide service and UP's provision of incorrect service—such as improper placement of railcars—to Sanimax's South St. Paul facility. As a direct result of UP's failures, Sanimax has incurred, at least, approximately                      in increased shipping costs and approximately                      in increased labor and handling costs associated with using trucking transportation to ship outbound finished goods as opposed to UP rail transportation. See SANIMAX\_UP\_STB-0000031. In addition, Sanimax has incurred damages in the form of lost sales in the amount of approximately                      . See *id.*

Sanimax further identifies the following documents from which the answer to this Interrogatory may be derived or ascertained pursuant to 49 C.F.R. § 1114.26(b): SANIMAX\_UP\_STB-0000018; SANIMAX\_UP\_STB-0000031.

Discovery in this matter is ongoing and Sanimax thus reserves the right to supplement or amend this response as additional information is discovered.

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### **INTERROGATORY NO. 2:**

Identify and describe all bases and support for Sanimax's assertion that "Sanimax has invested significant capital and resources for its South St. [Paul] Plant to use rail service to move its products."

### **RESPONSE TO INTERROGATORY NO. 2:**

In addition to its General Objections, Sanimax objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Additionally, Sanimax objects to this Interrogatory to the extent it is duplicative and cumulative of other Interrogatories.

Subject to and without waiving Sanimax's General and Specific Objections, Sanimax states: Sanimax is committed to the efficient and effective transportation of its finished products in a timely manner. Accordingly, since just 2019, Sanimax invested approximately towards the improvement of inbound and outbound transportation at Sanimax's South St. Paul facility. *See* SANIMAX\_UP\_STB-0000005. These projects have involved improvements to its trucking and rail transportation systems. Additionally, Sanimax recognizes the importance of rail transportation in shipping its finished goods to customers across North America. Since 2019, approximately of Sanimax's capital expenditure spend was related directly towards projects to facilitate the transportation of finished goods from the South St. Paul facility via railway and in reliance on obtaining service from the rail's only authorized common carrier, UP. *See Id.* These projects included necessary repairs to the on-site railroad switch and repairs to the rail track gauge.

And Sanimax's investment in rail continues to this day. Sanimax is proposing an additional investment at the South St. Paul facility for the completion of a conveying system from the poultry meal bagging area over to Track No. 827 to accommodate more efficient loading of finished goods to a railcar for transportation. *See* SANIMAX\_UP\_STB-0000006; SANIMAX\_UP\_STB-

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0000007. When complete, the conveying system will be capable of carrying 26,000 pounds of finished goods per day for loading onto a bulk material railcar. *See id.* With just this one conveying system, Sanimax will be capable of filling an entire bulk material railcar (180,000 pounds) per week. *See id.*

Sanimax further identifies the following documents from which the answer to this Interrogatory may be derived or ascertained pursuant to 49 C.F.R. § 1114.26(b): SANIMAX\_UP\_STB-0000001; SANIMAX\_UP\_STB-0000002; SANIMAX\_UP\_STB-0000004; SANIMAX\_UP\_STB-0000005; SANIMAX\_UP\_STB-0000006; SANIMAX\_UP\_STB-0000007.

Discovery in this matter is ongoing and Sanimax thus reserves the right to supplement or amend this response as additional information is discovered.

### **INTERROGATORY NO. 3:**

Identify and describe all bases and support for Sanimax's assertion that "[t]he sunk costs of rail loading and loading equipment installed at the plant [and] the structural limitations on truck transportation at the South St. Paul yard, and the rigid time constraints imposed by the decay of inbound organic materials make Sanimax captive to rail service for shipping enough outbound products to avoid a plant shutdown."

### **RESPONSE TO INTERROGATORY NO. 3:**

In addition to its General Objections, Sanimax objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Additionally, Sanimax objects to this Interrogatory to the extent it is duplicative and cumulative of other Interrogatories.

Subject to and without waiving Sanimax's General and Specific Objections, Sanimax states: Sanimax incorporates its response to UP's Interrogatory Nos. 2 and 5 by reference as if fully set forth herein.

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Discovery in this matter is ongoing and Sanimax thus reserves the right to supplement or amend this response as additional information is discovered.

### **INTERROGATORY NO. 4:**

Identify and describe all bases and support for Sanimax's assertion that UP's service has "force[d] Sanimax to find temporary, highly suboptimal alternatives to ship out its products or face shutting down the plant when UP fails to provide ... service[, and] Sanimax has no market recourse to correct these failures."

### **RESPONSE TO INTERROGATORY NO. 4:**

In addition to its General Objections, Sanimax objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Additionally, Sanimax objects to this Interrogatory to the extent it is duplicative and cumulative of other Interrogatories.

Subject to and without waiving Sanimax's General and Specific Objections, Sanimax states as follows: UP is the only common carrier railroad authorized to operate the railway adjacent and connected to the South St. Paul facility. As a result, when UP fails altogether to provide service or provides improper service to Sanimax's South St. Paul facility, Sanimax cannot resort to another common carrier railroad at the South St. Paul facility to transport its finished goods. Thus, Sanimax has no recourse but to find alternative, *non-rail* outbound transportation of its finished goods. In fact, as a result of UP's failures to provide proper service, Sanimax has made truck load shipments to Sanimax operated or third-party trans-loading stations where the finished goods are *then* transferred to railcars for shipment to customers. See SANIMAX\_UP\_STB-0000031.

Since 2019, Sanimax has invested approximately in rail related projects at its South St. Paul facility in reliance on receiving dependable rail transportation service. UP's failure to provide service or the provision of improper service (as shown in SANIMAX\_UP\_STB-0000011) has harmed Sanimax's investments accordingly.

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Sanimax further incorporates its response to UP's Interrogatory Nos. 2 and 5 by reference as if fully set forth herein.

Discovery in this matter is ongoing and Sanimax thus reserves the right to supplement or amend this response as additional information is discovered.

### **INTERROGATORY NO. 5:**

Identify and describe all instances when Sanimax has shut down, paused, or stopped operations ("Shut Down") at the South St. Paul Facility and the specific reason(s) for each Shut Down.

### **RESPONSE TO INTERROGATORY NO. 5:**

In addition to its General Objections, Sanimax objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Sanimax further objects to this Interrogatory as overly broad and unduly burdensome to the extent that it seeks information that is irrelevant to any claim or defense in this matter and not reasonably calculated to lead to admissible evidence. Additionally, Sanimax objects to this Interrogatory to the extent it is duplicative and cumulative of other Interrogatories.

Subject to and without waiving Sanimax's General and Specific Objections, Sanimax states: Despite UP's service failures, Sanimax has no choice but to take those actions necessary to the continuation of its operations at the South St. Paul facility. Fulfilling the rendering needs of the regional agri-food supply chain requires meeting an unending demand that mandates Sanimax operate continuously. UP's missed, late, or improper service forces Sanimax to fill any gaps stemming from these failures regardless of the cost to and other burdens on Sanimax.

In short, Sanimax serves a critical role in the agri-food supply chain by reclaiming animal by-products and rendering them into finished goods. Sanimax's suppliers comprise restaurants, industrial food manufacturers, farms, slaughterhouses, meat processing plants, and other food

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providers. These suppliers provide raw materials such as restaurant grease, animal waste, feathers, blood, or viscera for processing at the South St. Paul facility. The perishable nature of those raw materials, which cannot be placed in traditional landfills, demands very prompt collection and rendering by Sanimax to keep customer production moving and avoid environmental compliance violation issues.<sup>1</sup> In 2021 alone, Sanimax collected at least approximately of raw material from suppliers for rendering at the South St. Paul facility. See SANIMAX\_UP\_STB-0000019; SANIMAX\_UP\_STB-0000021; SANIMAX\_UP\_STB-0000023. Inbound material to the South St. Paul facility from those suppliers arrives six-days a week. The South St. Paul facility does not have the capacity to store raw material, so incoming material *remains on the tractor trailer* until the facility has the capacity to off-load and begin rendering the raw material. Accordingly, incoming raw material must be rendered continuously on a timely basis. If not rendered timely, the raw material will degrade and rot, rendering the material unusable, causing nuisances, and creating environmental issues such as bacterial infections and noxious gas.

After off-loading, receipt and collection of the raw material by Sanimax, the South St. Paul facility renders the raw material into finished goods—such as fats and oils, proteins, pet food ingredients, or industrial chemicals. The rendered material (now finished goods) must then be transported from the facility to its customers across North America. Sanimax has limited on-site storage capacity for finished goods and can store just approximately 926,000 pounds of finished goods. As a result, Sanimax must ship its finished goods to customers in a prompt manner to avoid filling and exceeding its storage capacity, requiring shut down of its rendering operations. Shut

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<sup>1</sup> Many customers are required by law to maintain sanitary, food-grade facilities under the U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA) regulatory supervision.

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down of Sanimax's rendering operations is not a viable business or environmental option because it (a) means the raw materials will degrade, (b) would interfere with the prompt collection of raw materials from suppliers, and (c) could impact the continued operation of suppliers, as they must dispose of the raw material from their retail and industrial locations.

In light of the foregoing, Sanimax has no choice but to take the actions necessary to continue shipment of finished goods so that it can continue its rendering operations. As a result, when UP fails to provide rail service or provides improper rail service—*e.g.*, through the improper placement of railcars—Sanimax is forced to utilize truck transportation to address the critical situation, which is both more expensive and far less efficient as it requires an entirely unnecessary additional step of trucking the finished goods to other rail trans-loading facilities. Trucking is the only transportation alternative at the South St. Paul facility because UP is the only rail carrier authorized to provide rail service over the relevant tracks that serve the facility, so when UP's service fails, Sanimax has no rail alternative at the South St. Paul facility.

Trucking to other trans-loading stations is, of course, more expensive than shipping finished goods by rail directly from the South St. Paul facility. First, Sanimax must pay the cost of trucking the finished goods to a trucking/rail trans-loading facility, a step that would be entirely unnecessary but for UP's service failures. On average, Sanimax pays approximately for each tanker and hopper truck it hires, and generally it takes four truckloads of finished goods to fill one railcar. *See SANIMAX\_UP\_STB-0000018*. Second, Sanimax must pay the increased cost of loading and handling the trucks. Sanimax estimates this cost comprises increased loading and handling fees of when shipping to another Sanimax facility for trans-loading, when shipping to the Progressive Rail Cannon Falls facility for trans-loading, and when shipping to the Schau Towing and Salvage facility for trans-loading. *See SANIMAX\_UP\_STB-*

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0000031. Afterwards, Sanimax must still pay another railcar company to ship the finished goods to the customers.

Thus, because several of Sanimax's end customers throughout North America require delivery of finished goods by rail, after the finished goods are loaded on trucks at the Sanimax facility they must be transported to another Sanimax facility or third-party trans-loading stations for transfer onto non-UP railcars for delivery to Sanimax customers. See SANIMAX\_UP\_STB-0000031. Therefore, when UP fails to service the South St. Paul facility, Sanimax uses trucking transport to move those finished goods to Sanimax's Green Bay and De Forest locations, or a third-party trans-loading station, and then trans-load those finished goods from the trucks onto at least Canadian National Railway or Canadian Pacific Railway railcars. In short, because Sanimax has no rail alternative as a result of UP's local monopoly on rail service to the South St. Paul facility, when UP fails to provide adequate service Sanimax must take the otherwise unnecessary step of loading outbound finished goods onto trucks in order to ship the product to another location to then trans-load the finished goods onto railcars provided by rail carriers that *will provide reliable rail service*.

From August 2020 to December 7, 2021, UP has failed to provide service to Sanimax on at least 19 occasions and UP has provided improper service on at least 30 occasions. See SANIMAX\_UP\_STB-0000011. Sanimax has paid at least approximately in increased costs associated with utilizing trucking transportation in the manner outlined above to correct UP's failed or improper service. See SANIMAX\_UP\_STB-0000031. For instance, as a result of UP's failures to provide proper service, Sanimax has had to make 72 truck load shipments to Sanimax operated or third-party trans-loading stations where the finished goods are *then* transferred to railcars for shipment to customers.

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Discovery in this matter is ongoing and Sanimax thus reserves the right to supplement or amend this response as additional information is discovered.

### **INTERROGATORY NO. 6:**

Identify any and all Charges Sanimax has incurred due to Sanimax's failure to provide service or meet a delivery deadline to its customers at or from the South St. Paul Facility.

### **RESPONSE TO INTERROGATORY NO. 6:**

In addition to its General Objections, Sanimax objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Sanimax further objects to this Interrogatory as overly board and unduly burdensome to the extent that it seeks information that is irrelevant to any claim or defense in this matter and not reasonably calculated to lead to admissible evidence because any alleged "failure to provide service or meet a delivery deadline" unrelated to UP's failures to provide service is not relevant to this proceeding. Additionally, Sanimax objects to this Interrogatory to the extent it is duplicative and cumulative of other Interrogatories.

Subject to and without waiving Sanimax's General and Specific Objections, Sanimax states as follows: Sanimax incorporates its response to UP's Interrogatory No. 7 by reference as if fully set forth herein.

Discovery in this matter is ongoing and Sanimax thus reserves the right to supplement or amend this response as additional information is discovered.

### **INTERROGATORY NO. 7:**

Identify any and all Charges Sanimax has incurred due to Sanimax's failure to provide service or meet a delivery deadline to its customers at or from the South St. Paul Facility, which Sanimax asserts were caused by a UP service failure.

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**RESPONSE TO INTERROGATORY NO. 7:**

In addition to its General Objections, Sanimax objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable doctrine or privilege. Sanimax further objects to this Interrogatory as overly broad and unduly burdensome to the extent that it seeks information that is irrelevant to any claim or defense in this matter and not reasonably calculated to lead to admissible evidence. Additionally, Sanimax objects to this Interrogatory to the extent it is duplicative and cumulative of other Interrogatories.

Subject to and without waiving Sanimax's General and Specific Objections, Sanimax states: Sanimax identifies the following documents from which the answer to this Interrogatory may be derived or ascertained pursuant to 49 C.F.R. § 1114.26(b): SANIMAX\_UP\_STB-0000031.

Discovery in this matter is ongoing and Sanimax thus reserves the right to supplement or amend this response as additional information is discovered.

**INTERROGATORY NO. 8:**

Describe and identify all Person(s), other than counsel, most knowledgeable about your responses to these Interrogatories.

**RESPONSE TO INTERROGATORY NO. 8:**

Sanimax identifies the following employees of Sanimax that are most knowledgeable about its responses to these Interrogatories. All communications with the following employees should be made through the undersigned counsel at Foley & Lardner LLP: Donn Johnson, Todd Strickler, and Michael Carlson.

Respectfully submitted,

Date filed: January 19, 2022

/s/ Richard F. Riley, Jr.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2022, I served the foregoing Responses and Objections to Interrogatories by email and first class mail on Union Pacific's attorneys at the following addresses:

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/s/ Richard F. Riley, Jr.

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