

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

208/32
MICHAEL L. ROSENTHAL
TEL 202.662.5448
FAX 202.778.5448
MROSENTHAL@COV.COM

June 19, 2003

BY HAND

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

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 copies of the Reply Comments of Union Pacific Railroad Company. Also enclosed is a diskette with a copy of the filing in a format compatible with WordPerfect 10.0. Please note that Exhibit No. 1 and Exhibit No. 2 contain color.

Kindly acknowledge receipt and filing of this material by date-stamping the extra copy of this letter and returning it to our messenger.

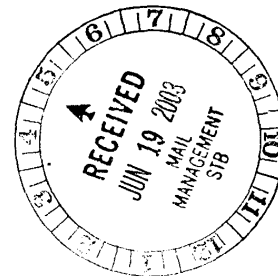
Sincerely,



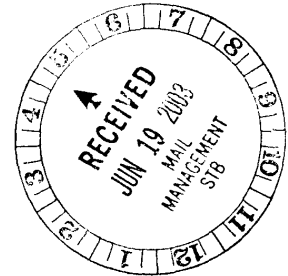
Michael L. Rosenthal

cc: Parties of Record

Enclosures



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

Office of Proceedings

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

J. MICHAEL HEMMER
LOUISE A. RINN
UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street, Room 830
Omaha, NE 68179
402/271-3309

Attorneys for Union Pacific Railroad Company

June 19, 2003

Contains Color Images

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**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

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

Union Pacific Railroad Company ("UP") submits these reply comments in response to the Joint Opening Comments of the The Western Coal Traffic League ("WCTL"), Edison Electric Institute ("EEI") and The National Industrial Transportation League ("NITL") (collectively "Joint Shippers") ("Joint Shipper Comments"). UP also joins in the reply comments filed in this proceeding by the Association of American Railroads.

OVERVIEW

For years, shippers and shipper groups have complained that SAC cases take too long and cost too much. Invited by the Board to simplify rate cases, Joint Shippers do the opposite. They seek at every turn to expand the scope and burden of discovery imposed on defendant railroads while avoiding any constraint on their requests or any responsibility for the cost of rate cases. They ignore both the costs and the burdens their proposals would impose on railroads, and propose rules likely to ignite more discovery disputes.

Most of their specific recommendations should be rejected because they fail to facilitate necessary and timely discovery in SAC rate cases. The Board should embrace Joint Shippers' support for (1) the concept of standard discovery (but not the oppressive and mandatory detail they demand), (2) the production by complainants of market dominance information with the complaint, (3) the adoption of discovery cut-off dates (but not necessarily the periods they suggest), and (4) paying for discovery in at least some circumstances. Otherwise, UP urges the Board to reject Joint Shippers' proposals as contrary to the purpose of this proceeding.

UP addresses many shortcomings in the Joint Shipper Comments. Our first section discusses the many attempts by Joint Shippers to overreach in establishing standard discovery. The second section discusses their refusal to limit discovery. The third section discusses appropriate time periods for discovery cut-offs. The final section discusses Joint Shippers' resistance to reasonable cost-sharing.

I. STANDARD DISCOVERY

Joint Shippers propose to expand the discovery burdens on railroads. They mask these burdens in (a) standard discovery requirements that allegedly mimic actual production by railroads; (b) supposedly reciprocal discovery production dates; and (c) superficially neutral discovery "guidelines." In reality, their specific proposals (a) call for production of information that far exceeds information railroads are required to compile or would use in their operations; (b) assign production deadlines that would be impossible to meet; and (c) impose rules that favor complainants at the expense of the railroads.

A. The Board Should Reject Joint Shippers' Standard Discovery Requests Directed At Railroads.

UP and Joint Shippers agree that standard discovery would expedite rate cases. With some modifications, UP could accept Joint Shippers' proposed standard discovery from complainants. See UP Reply Exhibit No. 1. UP parts company with Joint Shippers on the breadth and depth of the information they would demand from the railroads. See UP Reply Exhibit No. 2.¹

Much of the information specified in Joint Shippers' Exhibit No. 2 does not exist or can be developed only with considerable difficulty and substantial resources. The burden associated with creating, maintaining and producing the data would be disproportionate to both to the number of shippers who would benefit and the incremental value of the information in a SAC rate case. We will highlight the oppressive character of Joint Shippers' mandatory discovery with one example discussed below. UP provides detailed commentary on the specific requests in our Exhibit No. 2.

Joint Shippers' road property investment request illustrates the disconnect between the usefulness of the data they seek and the discovery burden they would impose. For the three coal shippers who have filed rate complaints against UP in the five years ending in 2002, UP transported approximately 58,000 carloads combined last year. This was only six-tenths of 1% of the 9.1 million carloads UP hauled for all

¹ UP Reply Exhibits Nos. 1 and 2 replicate Joint Shippers' proposed standard discovery requests. In Exhibit No. 1, we suggest how the discovery provided by complainants should be modified. In Exhibit No. 2, we highlight in the first column specific features of Joint Shippers' requests that require non-existent or extremely burdensome information. The second column contains UP's comments on the discovery requests.

customers during 2002. Those same three customers used fewer than 2,500 of UP's 33,000 route miles. Yet Joint Shippers would require UP to produce detailed roadway investment information for each valuation section in the entire UP system in every case, including (i) total track miles, separated among main line, sidings and yard; (ii) gross ton-miles; (iii) gross investment; (iv) accumulated depreciation; and (v) annual depreciation expense for each property account. Joint Shipper Comments, Exhibit No. 2 at 28.

UP has repeatedly explained in prior rate cases that it does not have actual investment data by valuation section, let alone by track within a valuation section. The Board's accounting rules do not require those data, and UP has no business need for them. See UP Reply Exhibit No. 2 at 1. See *also* STB Docket No. 42058, BNSF/UP Joint Variable Cost Reply Evidence (filed May 27, 2003), Vol. I at II-34 to 41. While UP has produced its valuation section data pursuant to Board precedent, those data do not include the detail now demanded by Joint Shippers. Moreover, the Board relies on URCS unit costs for roadway return and depreciation, ignoring the valuation section data, a decision recently affirmed by the D.C. Circuit. Union Pacific R.R. v. STB, No. 02-1198 (D.C. Cir., April 30, 2003) (*per curiam*).

B. The Board Should Require Complainants To Produce Information With Their Complaint But Not Require Defendants To Produce Information With Their Answer.

Joint Shippers acknowledge that a complainant should produce information related to market dominance when it serves the complaint. Joint Shipper Comments at

9. UP concurs and asks the Board to require production of market dominance discovery by complainant when it files its complaint.

Joint Shippers also propose that a defendant provide detailed information on both variable costs and stand-alone costs when it files its answer, a mere 20 days after service of the complaint. *Id.* at 10-11. The Board should reject that proposal because railroads cannot satisfy it. Joint Shippers overestimate a defendant's prior knowledge of an impending complaint and underestimate the time and effort required to develop information. Moreover, Joint Shippers fail to identify any value added by imposing an unrealistic 20-day deadline. The Board should let the parties develop a discovery plan at their conference.

Contrary to Joint Shippers' assumption, defendants do not share complainants' knowledge of when a complaint will be filed. Nor do they have notice of what traffic will be subject to a complaint until they see it. In addition, they face several important deadlines immediately after receiving the complaint.² See UP's Initial Comments at 5.

Joint Shippers wrongly assert that the mere existence of standard discovery request would provide sufficient notice for a defendant to produce detailed discovery. Twenty days does not allow adequate time to prepare the movement-specific data envisioned by Joint Shippers. For example, to provide crew wage data, UP must: (1) identify all applicable train symbols for the complaint traffic within the discovery cut-off dates; (2) use the train symbols to select all trains with complaint traffic from the train movement data; (3) abstract names of all train crew members from the train movement

² Apparently Joint Shippers also assume that a defendant is served with only one complaint at a time. History shows rate complaints often come in pairs.

data; (4) determine the social security numbers for those train crew members; (5) identify all relevant crew districts; (6) prepare an inquiry for the social security numbers to run against the crew wage database for the specified crew districts; (7) run the program and download the data; and (8) prepare documentation of the record layout and definition of pay codes. This cannot be done in 20 days. Yet developing specific crew wage data is perhaps the easiest of the requests to satisfy.

Despite their hurry to get their hands on all of the cost data they demand, Joint Shippers do not explain why receiving it within 20 days of the complaint is crucial. The standard procedural schedule for SAC rate cases calls for the completion of discovery within 75 days. 49 C.F.R. § 1111.8. UP Initial Comments at 9. Adopting Joint Shippers' unrealistic deadline will most likely lead to wasted effort instead of expediting the submission of evidence.

The parties should negotiate the timing and priority of railroad discovery production in their conference. They can adjust the schedule to the actual circumstances of each case. Any rule adopted by the Board, in contrast, would be inflexible and may require case-by-case modification.

C. The Board Should Reject Joint Shippers' Proposed Guidelines.

Joint Shippers also propose that the Board impose six "guidelines" to govern production. They offer no proof that any of these "guidelines" are needed to curb abusive practices or that the Board's current rules are inadequate to deal with attempts to avoid discovery. When combined with the broad, mandatory discovery Joint Shippers ask the Board to impose on defendants, these guidelines greatly increase both the discovery obligations of defendants and the severity of the consequences if a

defendant falls short of their impossible demands. The guidelines are not even-handed. Due to the disparity in both the nature and quantity of discovery the parties produce, only defendants would bear the burden, and complainants would enjoy almost unfettered discovery. The resulting imbalance makes compromise unlikely and discovery disputes almost certain. Joint Shippers' "guidelines" should be rejected.

UP identifies specific problems with the six "guidelines" below.

1. The Requirement To Produce All Databases And Repositories Is Unreasonable And Unnecessary.

Joint Shippers propose an inflexible rule that would require defendants to produce any and all databases or repositories that might contain information responsive to any of their broad discovery requests. They offer no proof that complainants have been prejudiced because they did not receive each and every form of responsive data which may exist. They do not explain why the Board would be unable to deal with improper withholding of responsive information with its current rules.³ Nonetheless, they urge the Board to adopt a rule that, when combined with their other proposals, would make the producing party (in virtually all instances a defendant) financially responsible for producing all information deemed responsive regardless of the associated burden, cumulative nature, or limited utility of the information. This unnecessary guideline places an intolerable burden on defendant railroads.

The guideline is contrary to both the Coal Rate Guidelines and the announced purpose of this proceeding. A complaining shipper must demonstrate a real, practical

³ Indeed, when it comes to proposals that would constrain complainants' discovery activities, Joint Shippers express confidence that "the Board has ample authority under current regulations to curb abuses." Joint Shipper Comments at 6.

need for the requested information and tailor its requests to reflect the least intrusive means of obtaining the necessary information. Id., 1 I.C.C.2d 520, 548 (1985).⁴

Insisting on every possible version or variation of the same data is not tailored discovery, but it certainly is intrusive and unnecessary. The proposed guideline also violates a stated purpose for this proceeding: to prevent discovery from being used for delay or harassment or from becoming unduly burdensome. September 4 Decision, at 4. But Joint Shippers' guideline would thwart that purpose by requiring railroads to provide every conceivable form of data that could be considered responsive to their overbroad discovery requests without regard to how burdensome, repetitive, or useful the information is and with the defendant bearing the cost.

2. The Requirement To Produce Everything In Computer-Readable Format Is Practicable Only On A Discovery Website.

UP agrees with Joint Shippers that responsive information that exists in databases should be produced in electronic form with information necessary to use it (e.g., record layout, field descriptions, decoders). UP's initial comments proposed the same requirement.

Joint Shippers go too far when they insist that any responsive information that exists in electronic form should be produced in computer-readable format. Exceptions

⁴ Joint Shippers offer the example of railroad terminal data used to allocate costs between unit train and other traffic to justify their rule. Their example fails the test. Such cost allocation information is completely irrelevant because railroad internal cost methodologies are not used by the Board. Potomac Electric Power Co. v. CSX Transportation, Inc. ("PEPCO"), 2 S.T.B. 290, 293-94 (1997); Northern States Power Co. v. Union Pac. R.R., Docket No. 42059. (S.T.B. served May 24, 2002) slip op. at 8-9. Moreover, such data are unnecessary for allocating costs between unit trains and other traffic because the Board uses only its published factors for such allocations. See FMC v. Union Pac. R.R., Docket No. 42022. (S.T.B. served May 12, 2000) slip op. at 84.

should exist for certain discovery materials. For example, parties typically produce correspondence and internal memoranda, including attachments and spreadsheets, in hard copy. The receiving party has no need to manipulate the text. Yet searching servers, hard drives, and CDs for electronic versions and sorting out drafts from final versions in order to produce an electronic copy is costly and unnecessary exercise. Scanning to create a pdf version for the limited volume of such documents could increase the cost to the producing party and delay production.

The relative burden changes if the parties share the cost of a discovery website. UP proposed in its Initial Comments that the parties should share the extra cost of scanning text images so that they can be posted on the website. The parties would also avoid costs of repeated copying, shipping, and storing hard copies. UP Initial Comments at 12.

3. The Requirement To Perform Special Studies And To Grant Complainant Access To Data Or Facilities Is Unworkable And Will Lead To Useless Data.

Joint Shippers propose next that the Board should redefine what constitutes a special study and, by inference, to expand what defendants must produce at their own expense. Further, they ask that when the newly-narrowed special study objection does apply, complainant have the right to access a defendant's data bases or facilities so that complainant can perform the special study. They point to no problems with the Board's current rules about special studies.

The Board should not and need not address what constitutes a special study in the abstract. While urging the Board to narrow the definition of special study, Joint Shippers imply that combining information from multiple databases (a special study)

requires no particular skill or effort. They suggest that railroads routinely mix data from various databases and therefore railroads should have no objection to writing more programs under a complainant's supervision. They avoid offering a concrete example of how their "clarification" would avoid problems. UP can cite a recent data misadventure that shows how it would cause serious problems.

Recent events demonstrate that Joint Shippers underestimate both the complexity of attempting such data manipulations and overstate the capability of their consultants to perform the work. AEPCO⁵ attempted to adjust UP and BNSF traffic data using UP and BNSF operating data. Because they serve fundamentally different purposes, the databases used incompatible definitions of "load" and "empty." Consequently, AEPCO created substantial amounts of non-existent traffic for its stand-alone railroad. After hundreds of hours, railroads' experts remained unable to decipher what AEPCO had done, let alone correct it. In its response to a UP petition cataloging this misuse of railroad data, AEPCO made contradictory complaints (i) that the railroads produced data that were too extensive and too complex, (ii) that the defendants should have produced even more data, and (iii) that the railroads should have combined the traffic and operating data instead of AEPCO. STB Finance Docket No. 42058, AEPCO Reply in Opposition to UP Petition to Require Submission of New Opening Evidence (filed May 7, 2003) at 8-10.

The practical obstacles to making raw data available to complainants and their consultants are many and serious. Those unfamiliar with the purpose of data and how

⁵ AEPCO is a WCTL member who is also represented by WCTL's counsel in its complaint against UP and BNSF.

they are collected are more likely to misuse the data or make mistakes. Even if railroads provide technical assistance in an effort to avoid mistakes, railroad personnel are still diverted from their ordinary responsibilities. Indeed, explaining and advising could consume more time than conducting the study in the first place. Online or on-site access to data by outsiders presents serious security and data integrity concerns. Finally, failure by complainants' consultants to clearly document their actions make it impossible to "audit" how they have manipulated the data. Attempting to do so after the fact can consume hundreds of hours and still provide no clear path to understanding or correction.

Sorting out whether responding to a request requires a special study and, if so, whether there is a non-intrusive way to let the complainant perform the work, are tasks best left to discovery conferences.

4. The Requirement That Parties Should be Precluded From Relying on Any Information Not Produced in Discovery Is An Unwarranted Extension of Board's Current Practice.

The Board's existing practices are quite capable of dealing with parties who improperly withhold discovery. See Potomac Electric Power Co. v. CSX Transportation, Inc., Docket No. 41989, (S.T.B. served Nov. 24, 1997). Joint Shippers offer no reason to suppose otherwise. Nonetheless, they propose that the Board articulate a broad new rule with no facts before it to demonstrate that a problem exists or to aid it in formulating when their proposed remedy should apply. The Board should reject their proposed rule because the scope of discovery Joint Shippers demand make such a rule potentially overreaching.

Discovery requests that seek all documents relating or regarding a broad subject matter are objectionable because they do not provide adequate notice to the responding party about what it should produce. Railroads face a particularly severe problem in SAC rate cases. Complainants request data regarding traffic of thousands of other shippers and for lines far beyond the complaint route (indeed sometimes system-wide) and Joint Shippers now demand that any database or repository where responsive data may reside must be produced.

A blanket rule that recognizes no exceptions and ignores whether complainant was prejudiced would be unfair. UP can offer examples where Joint Shippers' proposed rule would be unjustified. For example, if the information was available to or offered to a complainant who chose to not review it or to not designate it for copying, a defendant should be able to use it. Information that a defendant develops to submit as evidence, such as a switching study performed for the rate case, should not be excluded because it was not produced. When complainant opens the door by submitting questionable evidence, it should not be immune from proper rebuttal or impeachment.

5. The Requirement Of A Privilege Log In All Cases Is Unnecessary And Prejudicial.

Joint Shippers point to no abuses or problems they have encountered due to a lack of privilege logs. Although Joint Shippers present the rule requiring privilege logs as if it were neutral, in reality the obligation would fall far more heavily on defendants, who produce much more data.

Preparing privilege logs is expensive. The log would distract counsel from other tasks necessary to prepare the case and lead to more disputes. After serving the log on

the other party, one of two things will happen. The other party may ignore it. If so, preparing the log diverted resources from case preparation for no good reason. The other possibility is a dispute that the Board must decide. If so, the odds that a meaningful document regarding railroad cost or operating data will emerge are low. In the absence of any problems and given the dominance of data, not documents, in SAC case discovery, requiring privilege logs in every SAC rate case would be wasteful.

6. The Requirement that Railroads Immediately Produce All Transportation Contracts Is An Unnecessary Procedural Shortcut.

Joint Shippers propose that the Board issue a general order requiring railroads to produce all responsive transportation contracts (and any other responsive documents with confidentiality provisions). They ignore that this procedural shortcut would ride roughshod over both the rights of third parties and other valid objections by defendants and that less intrusive methods to secure prompt production of transportation contracts exist. They also offer no reason to believe they have regularly encountered serious delay in receiving contracts or that their preparation of evidence has been hampered.

Railroads have a statutory obligation to protect the confidentiality of their customers' contracts. 49 U.S.C. § 11904(b). They face serious legal penalties if they fail. Generally, railroads do not resist production of contracts once they are assured that they are protected from claims by third parties that the railroad violated the customer's right to confidentiality.

Joint Shippers ignore both legitimate objections, besides confidentiality, to the production of all contracts and the availability of other alternatives to facilitate their production.

UP lodges overbreadth and burden objections to requests for contracts for good reason. Requests for all contracts can elicit thousands of responsive documents, but only a relative handful will govern the majority of the traffic. In AEPCO, responsive contracts and tariffs exceeded 6,300 in one year and 5,300 in another year; but fewer than 120 of those documents accounted for nearly 80% of the relevant traffic. A general order requiring UP to produce all such contracts would both overrule a valid objection and interfere with negotiations to fashion a compromise.

The proposed general order is not the only or best way to facilitate prompt production of responsive contracts. UP follows a procedure that no complainant has objected to and that requires no action by the Board; but UP can produce contracts designated by a complainant with six weeks of receiving notice. UP offers the complainant the right to select a reasonable number for production. When the complainant informs UP of its selection, UP then promptly notifies the effected customers that it will produce the contracts by a certain date, unless the customer objects. Most customers raise no concerns; UP directs the few who do to consult with complainant's counsel. So far, an understanding has always been reached permitting UP to produce the contract. In the meantime, UP gathers and copies the contracts so that they are promptly produced.

This alternative protects the rights of third-party shippers, protects UP's right to object on other grounds, and produces contracts in a timely manner. The order Joint Shippers urge the Board to issue would deprive railroads of the opportunity to object to the scope of the request and would deprive third-party shippers of the right to raise their

concerns, while making no meaningful difference in how quickly contracts are produced after they are identified.

II. ADDITIONAL DISCOVERY

Joint Shippers object to any reform that would limit either the scope or depth of their discovery. At the same time, they attempt to expand defendants' discovery obligations at every turn. Joint Shippers avoid the fundamental question of whether reasonable discovery limits could improve discovery in SAC rate cases. Instead they engage in evasive maneuvers by (i) urging the Board to wait and see how discovery conferences work, (ii) invoking the red herring of depositions in federal civil litigation, and (iii) offering protective orders as a substitute. None of these ideas will simplify rate cases.

First, discovery conferences can narrow or resolve discovery disputes only if parties on both sides face rational boundaries. Discovery conferences cannot forge compromise when one side lacks any incentive to negotiate. If Joint Shippers had their way, no complainant would back down. Joint Shippers' proposals ask the Board to adopt rules (i) to expand the scope of mandatory discovery, (ii) to require railroads to turn over every database or repository that might contain data the complainant considers responsive, (iii) to eliminate the special study objection (unless a railroad allows complainant free access to underlying databases), and (iv) to require the railroads to pay all costs associated with producing anything complainants ask for. Those rules would assure a complainant virtually anything it could want in discovery. Complainants would have no incentive to compromise; defendants could only capitulate

or fight. Conferences with Board staff present can accomplish something only if both sides believe they are at risk if they persist in unreasonable positions.

Next, Joint Shippers resort to a red-herring. They argue that the prevalence of depositions in federal court litigation makes limits on interrogatories acceptable in that venue, but contend the lack of depositions in SAC rate cases makes similar limits unacceptable. Joint Shippers assiduously avoid the real question: would reasonable discovery limits in SAC rate cases serve a constructive role in eliminating needless delay and preventing discovery from becoming overwhelming? September 4 Decision at 4. Other parties agree they would. Joint Shippers prefer to discuss depositions, but that is not on point.

Finally, protective orders cannot substitute for reasonable discovery limits. Requiring a railroad to obtain a protective order shifts the burden to the victim of discovery abuse from the party who abuses discovery. With discovery limits the party seeking unusual or intrusive discovery must present its extra requests and justify why it needs that the particular discovery to make its case. Such a procedure conforms the Coal Rate Guidelines requirement to demonstrate that a real need for the discovery exists and that the request was tailored to be the least intrusive means. *Supra* at 548. Imposing a reasonable limit at the beginning of the case allows the parties to focus on what the most important information is. Moreover, substituting a request for a protective order for limits on discovery complicates the discovery process, contrary to the purpose of this proceeding. September 4 Decision at 2.

III. TIME PERIODS

A. Discovery Beginning Cut-Off Dates.

UP and Joint Shippers favor discovery cut-off dates for the beginning of production ("begin-dates"), although they would draw different lines. First, Joint Shippers appear to favor discovery covering two years, regardless of whether that is the most suitable period. Joint Shippers' two-year limit on qualitative market dominance would fail to capture much significant information. An arbitrary limit that bears no relationship to when the parties actively considered transportation alternatives makes no sense. UP's proposed standard looks to when rate negotiations took place because alternatives would be considered then. In contrast, two years for other information is too long. For example, if the complaint traffic began moving one year ago, two years worth of joint facility bills that do not include any complaint traffic is not tailored to the needs of the parties.

Second, the five-year period for roadway and maintenance-of-way ("MOW") operating expense Joint Shippers propose exceeds the information needed for a SAC rate case and would be intrusive because it would create a new record-keeping requirement. The five years of data required for the URCS unit costs already exists in the R-1 annual reports. URCS does not use either individual valuation section information or line-specific MOW operating expense. Joint Shippers want railroads to create and maintain five years of extremely detailed data for each valuation section and each line segment on their systems. This would be extremely intrusive. Railroads do not

have the detailed data they demand because the Board's rules do not require it and they do not need it.⁶

B. Discovery Cut-Off Dates and Enforcement.

Joint Shippers propose that 90 days before opening evidence is due (which they refer to as a "production cut-off date,") should serve as a critical date for three purposes. The production cut-off date would be: (i) the last date a party could serve new discovery requests; (ii) the end-date for the periods covered by discovery; and (iii) a finish line for what evidence could be filed. The production cut-off date would move automatically if the filing date changed. UP agrees that such limits are valuable, but it would define the limits differently.

First, UP concurs that no party should serve new discovery requests any later than 90 days before opening evidence is due. We do not agree that the deadline for new discovery requests should automatically move back if the filing date moves. The parties should negotiate whether the date should move when they discuss changing the opening due date.

Second, UP agrees that the end-date for the period covered by discovery should be no later than 90 days before the filing of opening evidence. We recommend two changes to Joint Shippers' deadline to minimize repeated searches. First, the 90 day

⁶ The Board eliminated railroads' obligations to maintain property accounts by valuation section because the ICC Termination Act repealed the statutory basis for the reporting obligation. See Removal of Obsolete Valuation Regulations, 1 S.T.B. 20 (1996). At that time, it specifically rejected claims that such detailed records were required for variable cost estimates. See Uniform System of Records of Property Changes for Railroad Companies, STB Ex Parte No. 512 (S.T.B. served Mar. 7, 1996) slip op. at 1-2. The Uniform System of Accounts does not require railroads to capture MOW operating expense by line segment. See 49 C.F.R. § 1200.3-1.

before filing deadline should be considered the latest possible date, but parties should agree to a date certain at the beginning of discovery. With that certainty, parties can conduct searches and undertake the programming to respond to discovery with some assurance that they will not have to perform repeated productions. Second, the end-date should not automatically move just because the filing date changes.⁷ The parties should discuss whether the date moves back when they discuss changing the filing dates. Defendants will have undertaken production in reliance of having a known end-date. Repeated searches and productions disrupt the work schedules of those who provide the data and unnecessarily strain the resources of defendants.

Third, Joint Shippers recommend that the end-date for discovery should limit the evidence parties can submit.⁸ As we understand it, they propose that evidence that depends on information created by a party after the end-date cannot be used by that party in its evidence unless the information is publicly available. If so, UP endorses that principle, but we want to clarify how it would work in practice. Applying a “bright-line” test, no evidence using information generated after the end-date could be used for any purpose. For example, if the end-date is June 30, but a complainant receives coal from a new mine covered by the rates at issue beginning July 15, neither party could submit variable cost evidence for movements from the new mine. The alternative test would permit a party to use information after the end-date if the other party opened the door

⁷ For example, a one-week extension to accommodate a conflict should not be grounds for re-opening discovery.

⁸ We understand their position to be that if the end-date is some date other than 90 days before the filing of evidence (as UP suggests above), then the actual end-date rather than the 90 day before filing threshold governs.

("open door test"). In the hypothetical above, if the complainant submitted variable cost evidence for the new moves, then defendants would be able to use actual movement characteristics in response.

UP prefers the bright-line test. It would be easier to enforce and it is more fair. Bright lines provide a clear standard both for the parties to guide their conduct and for the Board to judge compliance. If a party filed evidence that crossed the line, the evidence would be stricken. The bright line would also be more fair. Neither side would be allowed to cross the line.

In contrast, the open door test would engender disputes about whether the door was really opened or merely unlocked. For example, assume the complainant submits variable cost evidence for the quarters after the June 30 end-date by using average operating statistics derived from the first six months of the year. Assume further that major track construction beginning July 1 has caused a reroute of the complaint traffic that increases both the miles and the cycle time 10% and increases the crew costs 20% due to increased deadheading. The complainant knows about the reroute and has its own information about the increased cycle time for its equipment. It knows the miles have increased, but not exactly how much. It does not know about the disproportionate increase in crew costs. One can envision extended argument on whether the railroad should be permitted to put in actual statistics for any or all of these changes. With the open door test, parties would find it more difficult to judge what they were permitted to do and the Board would find itself deciding more disputes.

IV. COST SHARING

Joint Shippers argue that, because railroads control the amount of discovery produced, complainants should bear no costs associated with satisfying their discovery requests. The Board should reject their position because it rests on topsy-turvy logic, promotes aggressive discovery, and fosters more discovery disputes. At the very least, the Board should hold Joint Shippers to their admission that complainants should pay when they select the material to be produced or otherwise direct the actions of a defendant responding to their requests. The Board should also clarify that complainants should pay all of the costs associated with such activities.

First, Joint Shippers turn logic upside-down when they claim that defendant railroads, not complainants, control the amount of discovery produced. With their ground rules, complainants call all the shots, leaving defendants with few choices. The Board should step back and look at the total package Joint Shippers have asked for: (1) the adoption of mandatory and excessively broad standard discovery requests directed at railroads; (2) unlimited additional discovery; (3) the requirement to produce every data base or repository with any potentially responsive information; (4) the imposition of strict exclusions of any evidence that may be derived from information complainants believe should have been produced but was not; and (5) absolution from any financial responsibility for the discovery complainant seeks unless a defendant turns over the keys to its facilities and grants access to its databases.

Second, Joint Shippers' position that complaints should have a license for unfettered discovery promotes aggressive discovery. Joint Shippers maintain that complainants should be able file unlimited requests, no matter how cumulative or

insignificant.⁹ Relieved from cost-sharing, complainants would face no financial responsibility. This makes them indifferent to a cost-benefit analysis and eliminates any inducement to rein-in their requests. In short, Joint Shippers have delivered a recipe for aggressive discovery by complainants in a proceeding instituted to find ways to limit the cost and burden of discovery.

Third, increased discovery disputes would inevitably result from the proposed rule. Complainants' lawyers and consultants would be free to indulge their creativity because the defendants would pay the bill. Complainants would have no incentive to compromise. With the game rigged in their favor, they would face no risk. They would view any deal as a net loss. Defendants would face the choice of capitulating or fighting.

Joint Shippers indicate a willingness to pay in some circumstances. Joint Shipper Comments at 7, 25. When complainants inspect or designate documents for copying, they admit complainants should pay. UP asks the Board to clarify that in those situations, the requesting party should pay for all of the costs associated with making documents available for review, including the time to locate and gather, the time of the railroad employees monitoring the review, the copying, and the shipping.

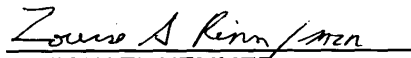
⁹ Joint Shippers suggest there is no evidence complainants routinely seek irrelevant data. UP identified two instances in its Initial Comments, at 7 n.7 (divisions for joint at issue and internal costs are irrelevant). But irrelevance is too narrow a standard.

Producing marginal data can require substantial effort and cost. When the complainant ends up not using it, a railroad is justified in opposing similar productions in other cases. UP could identify several such instances, but one will serve as an illustration. UP produced accounting data to test whether line specific MOW expense could be derived. The complainant did not use it. When the same data was recycled in two other cases at complainants' request, their cost consultant declared it unusable for that purpose. UP agrees.

CONCLUSION

UP urges the Board to reject Joint Shippers' one-sided proposals with the few exceptions noted. UP supports the Board's objective of simplifying discovery.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Louise A. Rinn", is written over a horizontal line.

J. MICHAEL HEMMER

LOUISE A. RINN

Union Pacific Railroad Company

1416 Dodge Street, Room 830

Omaha, NE 68179

402/271-3309

June 19, 2003

Attorneys for Union Pacific Railroad Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Comments of Union Pacific Railroad Company was sent on this 19th day of June 2003, by first-class mail, postage prepaid, to:

Ray Hickman
Options Net
10435 S. Sandusky Avenue
Tulsa, OK 74137

Gordon P. MacDougall
1025 Connecticut Avenue, NW
Washington, DC 20036

John H. Mielke
Public Service Commission
State of North Dakota
600 E. Boulevard Avenue
Department 408
Bismark, ND 58505-0480

Steven D. Strege
North Dakota Grain Dealers Association
118 Broadway
606 Black Building
Fargo, ND 58102

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Cynthia L. Quarterman
Brooke L. Gaede
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Richard E. Weicher
Michael E. Roper
The Burlington Northern and
Santa Fe Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131

Michael F. McBride
LeBoeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, NW
Suite 1200
Washington, DC 20009-5728

William L. Slover
C. Michael Loftus
John H. LeSeur
Kelvin J. Dowd
Christopher A. Mills
Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036-3003

Nicholas J. DiMichael
Michael H. Higgins
Thompson Hine, LLP
1920 N Street, NW
Suite 800
Washington, DC 20036

Thomas C. Canter
The National Coal Transportation
Association
4 Meadow Lark Lane
Suite 100
Littleton, CO 80127-5718

Paul Samuel Smith
Rosalind A. Knapp
Kirk K. Van Tine
Office of General Counsel
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Louis P. Warchot
Dennis J. Starks
Association of American Railroads
50 F Street, NW
Washington, DC 20001

Carolyn F. Corwin
Michael Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, NW
Washington, DC 20005

Peter J. Shudtz
1331 Pennsylvania Avenue, NW
Suite 560
Washington, DC 20004

Paul R. Hitchcock
500 Water Street
Jacksonville, FL 32202

James A. Squires
George Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241


Michael Rosenthal

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SHIPPER STANDARD DISCOVERY BY COMPLAINANTS IN SAC CASES	UP COMMENTS
1. Transportation Alternatives – Studies – The Complainant must provide copies of all studies or reports that address the feasibility of transporting the traffic subject to the complaint between the origin(s) and destination via a mode or carrier other than the Defendant.	Should include all studies or reports and underlying data that complainant's consultants in the case have conducted for purposes other than litigation but that are not be in possession of complainant.
2. Transportation Alternatives – Correspondence – The Complainant must provide copies of all correspondence between it and carriers other than the Defendant(s) concerning the transportation of the traffic subject to the complaint between the origin(s) and destination via a mode or carrier other than Defendant.	The production should include all information going back to one year prior to the effective date of the last contract.
3. Traffic Forecasts – The Complainant must provide all forecasts of future volumes of the traffic subject to the Complaint that are expected to be transported to the destination, together with an identification of the origin(s) expected to be used.	Complainant should identify who developed the forecast and certify it was done for business purposes, not prepared for litigation.
4. Commodity Forecasts – The Complainant must provide all forecasts of future volumes of the commodity comprising the traffic subject to the Complaint that are expected to be transported to its other facilities using the route of the Complainant's proposed stand-alone railroad in whole or in part, together with an identification of the origin(s) expected to be used and the destination(s) to which the commodity is expected to be transported.	Complainant should identify who developed the forecast and certify it was done for business purposes, not prepared for litigation.
5. Cost Projections – The Complainant must provide all estimates and/or forecasts of the cost of transporting the traffic subject to the Complaint between the origin(s) and destination(s), for each time period available.	Complainant should identify who developed the projections and identify the business purpose why the cost projections were prepared.

SHIPPER STANDARD DISCOVERY BY COMPLAINANTS IN SAC CASES	UP COMMENTS
6. <u>Commodity Supply Agreements</u> – The Complainant must provide copies of all contracts (including amendments and supplements), quotations or other documents that memorialize the terms on which the traffic subject to the Complaint that is transported between the origin(s) and destination(s) is purchased by or for [REDACTED] the Complainant.	Should apply whether complainant is consignee or consignor.

2

SHIPPER STANDARD DISCOVERY BY RAILROADS IN SAC CASES	UP COMMENTS
A. VARIABLE COSTS 1. Road Property Investment Costs – For each line segment which the issue traffic traverses (or as close thereto as geographically possible), the railroad <u>must</u> provide detailed valuation records for the most recent calendar year. For each valuation section, the data produced <u>must</u> include the geographic limits, and an identification of all track-miles included in the valuation section separated between main line, sidings and yards. For each valuation section, the railroad also <u>must</u> provide, by property account, the gross investment, accumulated depreciation expenses, the annual depreciation expenses, and the gross ton-miles generated over the valuation section. Finally, using the same records, the railroad <u>must</u> provide the same information described above for its entire system for the same calendar year, as well as a tie of these monies and statistics to its Annual Report Form R-1.	Much of the data included in this request does not exist and cannot be created. BNSF/UP Joint Variable Cost Evidence, <u>AEPCO v. BNSF & UP</u>, Docket No. 42058 at II.-34-41, Vol. 1, May 27, 2003. The Board eliminated railroads' obligations to maintain property accounts by valuation section because ICC TA repealed the statutory basis for the reporting obligation. <u>See Removal of Obsolete Valuation Regulations</u>, 1 S.T.B. 20 (1996). It specifically rejected claims that such detailed records were required for variable cost estimates. <u>See Uniform System of Records of Property Changes for Railroad Companies</u>, STB Ex Parte No. 512 (S.T.B. served Mar. 7, 1996), slip op. at 1-2. NOTE: The request requires detail for UP's entire 33,000 mile system for each regardless of how many miles that complaint traffic moves.

SHIPPER STANDARD DISCOVERY BY RAILROADS IN SAC CASES	UP COMMENTS
2. Roadway Maintenance Expenses – For each line segment which the issue traffic traverses (or as close thereto as geographically possible), the railroad must provide detailed roadway maintenance expenses by expense account for the most recent five (5) calendar years, together with a tie or "cross-walk" between the maintenance monies provided for each line segment and the maintenance monies included in the Annual Report Form R-1. For each line segment, the geographic limits must be identified, including an identification of all track-miles separated between main line, sidings and yards. For each line segment (or as close thereto as geographically possible), the railroad must provide the gross ton-miles generated over that line segment.	Line-segment Maintenance-of-Way operating expense data does not exist and UP's accounting data cannot produce line-specific expenses. <u>Northern States Power Co. v. UP</u>, Docket No. 42059 (S.T.B. served May 24, 2002), slip op. at 6. STB accounting rules do not require railroads to maintain or report such data. 49 C.F.R. 1200, 3-1.
3. Equipment Capital Costs – For each locomotive and railcar ("assets") used to handle the issue traffic (or the pool of locomotives and railcars from which the locomotives and railcars are drawn), the railroad must provide the specific financial arrangements used to acquire each asset. The railroad must provide the payment details supporting each acquisition, a physical description of each asset, the miles each asset traveled, and the hours each asset was utilized in the issue service.	UP does not maintain data showing how much time individual locomotives or cars are used to serve particular customers. If complainant wants to attempt to derive that from train movement or car movement data, it may do so. Although Joint Shippers do not say so, UP assumes that the request is limited to assets it owns or leases.

SHIPPER STANDARD DISCOVERY BY RAILROADS IN SAC CASES	UP COMMENTS
4. <u>Equipment Maintenance</u> – For each locomotive and railcar used to handle the issue traffic (or the pool of locomotives and railcars from which the locomotives and railcars are drawn), the railroad must provide detailed maintenance expenses by equipment type for the most recent three (3) calendar years, together with a tie or "cross-walk" between the maintenance monies provided for each locomotive and railcar and the maintenance monies included in the Annual Report Form R-1. For each locomotive and railcar, the railroad must provide the miles traveled for the most recent three (3) calendar years.	UP does not have this information. Equipment maintenance costs are managed by shop, not individual assets. Although Joint Shippers do not say so, UP assumes that the request is limited to assets it owns or leases.
5. <u>Crew Wages</u> – For each train and engine crew and yard crew (if applicable) handling the issue traffic between the origin and destination of each movement, the railroad must provide all payments that it made to that crew including straight time, overtime and constructive allowances. The railroad also must identify and describe all activities that the train and engine crew (and/or yard crew) performed during each tour of duty where the issue traffic was handled. The railroad must provide the same information for any third parties with which it contracted to handle the issue traffic.	UP can and does provide detailed wage data for line haul crews. Depending on the traffic, it may not be possible to identify what yard jobs handled the complaint traffic. UP also provides various reports regarding train activity or performance, but it does not routinely collect and maintain records regarding daily activities by crew. UP does not have information about employees of third parties.
6. <u>Locomotive Fuel</u> – For each locomotive used to handle the issue traffic (or the pool of locomotives from which the locomotives are drawn), the railroad must provide the gallons of fuel consumed in handling the issue traffic between origin and designation, the miles each locomotive moved when consuming the fuel, the cost of fuel, and a tie or "cross-walk" between the fuel monies provided for each locomotive and the fuel monies included in the Annual Report Form R-1.	Fuel consumption data for specific complaint trains exists, if at all, on a sporadic and incomplete basis. It is not retained in the ordinary course of business. Attempting to locate and collect such data entails a special study. There is no crosswalk for fuel consumed by individual locomotive and fuel expense in R-1.

SHIPPER STANDARD DISCOVERY BY RAILROADS IN SAC CASES	
B. STAND-ALONE COSTS	UP COMMENTS
1. <u>Traffic Data</u> – For each state and/or group of specific rail lines identified in the Complainant's scope notice, the railroad must provide specific information for each movement of traffic handled by the railroad as an originating, terminating, overhead or single-line carrier. The specific information must identify and include all the information contained on the waybill or freight bill that governs each movement of traffic. In addition, the specific information must include all the operating characteristics of the train(s) that handle each movement of traffic.	Retrieving or recreating the waybill would be burdensome, but UP does provide data regarding revenue carloads derived from waybills. "Operating characteristics" is vague and ambiguous. In any event, attempting to identify each and every train that hauled a manifest shipment would be impossible. For trainload traffic, some information may be available depending on what Joint Shippers mean by "all the operating characteristics of the train(s) that handle each movement of traffic."
2. <u>Revenue Data</u> – For each movement of traffic identified in the "Traffic Data," the railroad must provide the revenues it receives plus any refunds or rebates associated with the traffic. The railroad also must provide all revenue division data for the traffic commodity groups identified in the "Traffic Data."	UP provides its net revenue received for each carload. Producing all accounting adjustments and corrections would be burdensome and may not be possible. For non-Rule 11 interline movements, UP has only gross revenue, not net revenue, for connections. UP has no off-line miles. UP does not have division data for traffic commodity groups.

SHIPPER STANDARD DISCOVERY BY RAILROADS IN SAC CASES	UP COMMENTS
3. <u>Forecasts</u> – For each movement identified in the "Traffic Data," the railroad must provide all forecasts of projected changes in revenues and traffic levels for each time period available. The railroad also must provide all forecasts of revenues and traffic levels for traffic that it plans to move in each state and/or each group of rail lines identified in the Complainant's scope notice that did not appear in the "Traffic Data." The railroad must provide all forecasts of changes in its costs for each time period available.	If Joint Shippers' proposed rule requiring defendants to produce all repositories with responsive documents, this literally mandates a search of thousands of individual customer files. UP did not include traffic or revenue forecasts in its standard discovery because this can be best addressed in case-specific discovery requests and conferences. For example, multiple commodity forecasts were appropriate in <u>FMC</u> but inappropriate in <u>WPL</u>.
4. <u>Transportation Contracts/Tariffs</u> – For each movement identified in the "Traffic Data," the railroad must provide all transportation contracts (including amendments and supplements) and all tariffs or common carrier rate authorities that govern each movement.	Mandatory production of all relevant contracts and price instruments is overbroad and burdensome in most instances. Even after AEPCO was ordered to limit its requests to UP lines used by the complaint traffic, UP identified 5,300 different responsive contracts and other price instruments for the year 2001 alone, but the top 53 accounted for 78% of the traffic. AEPCO never challenged UP's objection that the request was overbroad and burdensome. Ultimately, UP produced more than 100 contracts and price instruments designated by AEPCO.
5. <u>Joint Facility Agreements</u> – For each state and/or group of rail lines identified in the Complainant's scope notice, the railroad must provide all joint facility agreements (including amendments and supplements) to which it is a party. For each joint facility	UP's practice is to identify joint facilities in the appropriate area and to allow complainant to select the agreements it wants. UP also offers the complainant its selection of or review of related joint facility bills for a reasonable period.

agreement, the railroad must provide all payments received and the associated service units and all payments made and the associated service units.	Joint Shippers do not justify mandatory production of all potentially responsive documents instead.
SHIPPER STANDARD DISCOVERY BY RAILROADS IN SAC CASES	UP COMMENTS
6. <u>Investment In Roadway Properties</u> – Each item that makes up the construction of a line of railroad from grading to rail (including bridges) must be identified by the railroad. For each item identified, the railroad must provide and document the size of each item and the cost to acquire, transport and install each item. For the associated roadway facilities not identified from grading to rail, the railroad must identify and document each facility (e.g., signal system, microwave, buildings, etc.), the size of each facility and the cost to acquire or construct each facility.	Read literally, this would require detailed information for each tie, bolt and switch, etc. UP produces extensive information about the price it pays for materials and wage rates it pays to MOW employees. It also provides AFE's that document costs, including those for contract services, of all types for projects. Beyond the location and description of many facilities, it is not possible to provide the specific cost of particular facilities (e.g., tunnels, buildings, microwave towers, etc.).
7. <u>Land</u> – For each state and/or group of rail lines identified in the Complainant's scope notice, the railroad must provide land valuation maps for its rail lines, including all deeds or other instruments of grants or conveyance, all land grants, all easements and all donated rights-of-way. The railroad also must provide all documents related to land sales and appraisals for each state.	UP provides valuation maps. It also makes documents relating to recent real estate transactions near the lines in question available for review. UP does not maintain deeds on its premises, but those can be located in public offices using references from the valuation maps. To the extent Joint Shippers propose that UP must provide appraisals near Amarillo, TX for complaint traffic that originate in Houston, their standard discovery is overbroad and oppressive.
8. <u>Rail Operating Information</u> – The railroad must identify each category of employee that it employs. For each category of employee, the railroad must provide the range in base salaries, the range in fringe benefits paid, the range in overtime	Standard discovery should be satisfied by Wage Form A & B reports. Additional detail should be worked out in individual cases.

paid and the range in bonuses paid. The railroad also must provide locomotive leases and maintenance contracts and railcar leases and maintenance contracts for the locomotives and railcars used to transport traffic identified in the "Traffic Data." If this information is not maintained by individual locomotive or railcar, the railroad must provide the information for all locomotives and railcars of the type or model used to transport traffic identified in the "Traffic Data."	Traffic tapes include car numbers but no locomotives. Complainants can select a reasonable number of locomotive and car leases and maintenance agreements for particular assets or groups of assets. Since essentially all locomotive models or car types will be used by some non-complaint traffic on all but the lowest density lines, Joint Shippers' proposal as written would require production of all leases and maintenance contracts.
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