

**BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET No. 36500**

**CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.
CANADIAN PACIFIC RAILWAY LIMITED, ET AL.**

– CONTROL –

**KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY
COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS
MEXICAN RAILWAY COMPANY**

APPLICANTS' REPLY TO UNION PACIFIC RAILROAD COMPANY'S MOTION TO COMPEL

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COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS
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APPLICANTS' REPLY TO UNION PACIFIC RAILROAD COMPANY'S MOTION TO COMPEL

Canadian Pacific¹ and Kansas City Southern² (the "Applicants") file the following Reply to Union Pacific Railroad Company ("UP")'s Motion to Compel (UP-8), served on Applicants on January 27, 2022 (the "Motion to Compel" or "Motion").

¹ Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, "CP").

² Kansas City Southern, the Kansas City Southern Railway Company ("KCSR"), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, "KCS"). KCS also has a subsidiary in Mexico, Kansas City Southern de Mexico ("KCSM"). KCSM is not an applicant in this proceeding. The Board does not have jurisdiction over KCSM as it operates in Mexico. KCSM provides rail service in Mexico pursuant to a Concession granted by the Mexican government. However, for purposes of this motion, KCS includes KCSM.

INTRODUCTION

UP issued three discovery requests seeking communications between KCS and KCSM concerning rates for cross-border traffic via the Laredo gateway. UP confirmed that the purpose of its discovery requests is to understand how KCS prices the Mexico-leg of cross-border traffic. *See* Mot.’s Ex. C, at 2-3 (“The issue that UP sought to address with its discovery requests [Nos. 94, 95, and 96 is]: how does KCS/KCSM price single-line movements and the rates it offers for interline movements when it is competing with UP for business moving between Mexican points and points in the U.S. served by KCS.”); *see also* Mot. at 4 (“UP therefore propounded document requests designed to examine directly KCS’s rate-setting practices when KCS presently has incentives to foreclose competition.”).

To that end, KCS produced documents which demonstrate how KCS/KCSM sets prices, including documents which discuss KCS’s policies, procedures, and compliance program. KCS also produced documents which provide further detail regarding KCS’s high level pricing strategy and considerations for certain opportunities. In response to KCS’s production of its pricing policy, UP issued 30 new discovery requests on January 26, demanding a five-day turnaround. Without waiting for this discovery, UP filed this Motion to Compel on January 27, 2022. Counsel for KCS asked UP to review the new discovery, as it would directly address how KCS prices. *See* Exhibit A. UP refused to withdraw its Motion, again claiming that the purpose of the discovery was to understand “how KCS actually prices its single-line service and KCSM’s interchange services where UP and KCS compete for business originating and terminating in Mexico.” *Id.* Applicants responded to the 30 requests within five days, on January 31, 2022, and produced related documents the following day. UP did not supplement or amend its Motion to inform the Court that it received additional information. To date, KCS has produced:

- KCS’s pricing policy documents, which explain the policy underlying rates for Mexico-based movements, including procedures and specific factors KCS considers when making pricing decisions, Mexican regulations that may impact prices, and KCS’s compliance program. These documents show how KCS determines rates for KCSM-carried traffic in Mexico, irrespective of the interline partner.
- Rates justifications considered for rate differentiation made under the pricing policy.
- Results of KCS’s compliance program under the pricing policy.
- Reports from KCS’s “Pricing Review Board,” which provide snapshots of considerations for specific bid opportunities between 2018 and 2021 and give insight to high-level strategy considerations for making rate offers. KCS produced the Pricing Review Board reports for certain commodity groups UP specifically requested such as grain, automotive, chemicals, and petroleum.
- Long-range planning documents, which include specific opportunities, general considerations, and pricing strategy.

Additionally, KCS:

- Responded to 30 discovery requests, on an expedited five-day turnaround, explaining in detail how the KCS Mexico-leg pricing policies worked. Multiple times, KCS explained that KCS has not, does not, and cannot discriminate in Mexico-leg rates regardless of whether UP or KCSR is the interline partner.
- Explained how revenue and pricing was determined generally, including the underlying factors typically considered such as market conditions, operating and

cost considerations, types of service, volume, risk premiums, and asset availability, and explained that divisions between KCSR and KCSM were established for similar considerations such as mileage divisions, operating cost considerations, base costs (such as higher fuel costs in Mexico), and regulatory requirements.

- Explained the meaning of “commercially reasonable” as used by Applicants in response to a number discovery requests as well as in the Application itself. *See, e.g.,* Ex. B, Applicants’ Joint Responses and Objections to UP’s First Set of Discovery, Nos. 61, 62, 65.

With substantial discovery responding to UP’s requests, UP changed tacks, arguing it is entitled to broad discovery of thousands of KCS’s day-to-day business documents in order to confirm KCS’s past compliance in pricing with its obligations under the Board’s 2004 “Tex Mex” Decision.³ This broad discovery seeks information not on “how” KCSR/KCSM prices generally, but to confirm rate offers on an individual, customer-by-customer basis, including all potential discussions concerning possible rates or negotiating tactics for multiple commodities, routes, and possibilities, and for several years. *See* Mot. at 9 (a policy “is no substitute for discovery designed to explore whether the policy is being followed. UP’s discovery requests are aimed at obtaining exactly that type of information.”)(emphasis added).

Board precedent is very clear that, “discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” *Duke Energy Corp. v. Norfolk So. Rwy. Co.*, 2002 WL 1730020, at *3 (S.T.B., July 26, 2002). UP’s requests are not

³ *Kansas City Southern – Control – The Kansas City Southern Railway Co., et al.*, at *16-19. STB Fin. Docket 34342, Decision No. 12(served Nov. 29, 2004)(“Tex Mex Decision”)

reasonable, narrowly drawn, and are not directed to a relevant issue, and thus do not meet this well-established standard. To satisfy such broad requests, KCS would potentially have to search many thousands of documents, including years' worth of day-to-day email communications. Using search terms and a limited commodities list does not reduce the burden that UP seeks to impose. As KCS explained to UP, rates are developed over time on an individual customer basis. KCS would have to conduct a special study just to know for which customers, and for which lanes KCS competes with UP.

Concerns regarding a special study aside, the requests demand significant resources even using search terms. KCS ran a number of searches for UP and BNSF (which, in some of its requests, sought similar information). BNSF at least limited its requested searches to specific commodity products, and yet still the average terms yielded over 20,000 results per year. UP does not address the inherent overbreadth of requests that demand review of five years' worth of day-to-day communications. UP acknowledges in its Motion that its response has been to try different terms.

These discovery requests impose significant burden for little, if any, probative value. UP would have to reverse engineer each rate discussion on a granular, individual bid basis, with likely only pieces of each puzzle available. The value of any "example" would be questionable at best and likely subject to a distracting and expensive sideshow. For these reasons, the Court should deny UP's Motion to Compel.

ARGUMENT

I. Because UP made improper assumptions about how KCS prices, its overly broad requests target the wrong information.

KCSM was granted a Concession by the Mexican government to provide exclusive rail service from the Laredo gateway into Mexico. If a U.S. carrier wants to participate in a

movement of traffic via the Laredo gateway, KCSM provides the Mexico-leg portion of the movement. Shippers have various choices of rail carriers for the U.S.-portion of the movement, depending on where the shipment is going. When quoting a rate for a movement that starts (or ends) in Mexico, KCSM provides the rate for the Mexico side and other U.S. carriers, such as UP and KCSR, provide the rate for the U.S. side.

This is the impetus for UP's discovery. UP contends that KCS's (and post-merger, CPKC's) control over KCSM pricing will provide KCS (or CPKC) with the ability to increase "the rate KCSM quotes for interline service with UP, so that a KCSM-UP option will no longer be a viable alternative for customers." Mot. at 3.⁴ UP propounded discovery "to examine directly KCS's rate-setting practices when KCS presently has incentives to foreclose competition." Mot. at 4. The substance of UP's requests seeks KCS to "produce all documents that reflect communications between KCS and KCSM regarding rates (for KCS, KCSM, and UP) for traffic to be handled by UP via the Laredo gateway." See Mot. at 5.

UP propounded requests seeking communications between KCS and KCSM because it thought that KCSM and KCS operated separate pricing groups that developed rates between the two. Mot. at 5 ("Through these requests UP sought to obtain internal communications that would reveal KCS and KCSM pricing strategies where KCS competes with UP in the United States for business originated or terminated by KCSM in Mexico."). However, as was explained to UP in the meet and confer process on these requests, KCS has one core pricing team for both

⁴ UP seems to argue that the discovery is aimed at confirming if KCS has manipulated KCSM rates in the past (Mot. at 4) while at the same time saying that KCS currently must cooperate with UP, and that the real threat is the merger and the future CPKC (Mot. at 3). Since UP is admitting that KCS currently cooperates with UP and provides commercially reasonable rates, then discovery of KCS's past rate discussions is pointless.

U.S. and Mexico. Communications between KCS and KCSM are not dispositive to understanding KCS pricing strategy.

Once KCS understood through meet-and-confers with counsel what information UP was interested in understanding, KCS produced pricing strategy reports and its pricing policy. These documents show KCS's pricing strategy considerations and how KCS prices the Mexico-leg of cross-border rates. Pursuant to UP's additional January 26 discovery requests, KCS produced, on an expedited five-day turnaround, substantial information on KCS's pricing practices for the Mexico-leg rates. UP (along with all other interested parties) is now in possession of KCS's pricing policy; 30 interrogatory responses that provide detailed information on how KCS's policies, procedures, and compliance program work; and information that demonstrates that KCS cannot discriminate Mexico-leg rates based on the interline partner. See Mot. at 3.

II. Because UP's discovery requests would require a special study and impose an obligation to conduct an unreasonable search, the requests impose undue burden on KCS that search terms cannot address.

UP originally stated that it issued these requests to understand KCS's pricing strategies for cross-border traffic via the Laredo gateway. See Mot. at 5. If this were all that was sought, then the above-enumerated discovery KCS produced would respond fully to these requests.

UP continues to seek this discovery, however, which indicates it is interested in more than simply "how" KCS prices. UP argues it is its right, and within the scope of proper discovery in this proceeding, to confirm the "commercial reasonableness" of every individual, customer-by-customer, rate offer made over the last five to 18 years. See Mot. at 9.

This far exceeds the bounds of appropriate discovery. UP's discovery seeks review of all of KCS's rate development documents for the past five to 18 years.⁵ KCS explained to UP that its rates are developed over time, through an iterative process and on a granular level, by customer and by lane. Putting aside the effort involved to search for all responsive documents, and assuming KCS had a 100% return rate, KCS would have to produce thousands of documents. This is not a multi-year DOJ litigation, but a tightly scheduled regulatory proceeding.

The burden on KCS of searching for responsive documents to these requests is enormous. KCS does not track rate development by who the competitor may be. In order even to identify which documents are relevant, KCS would have to undertake a significant special study to figure out which customers and which lanes compete with UP—for every commodity. UP's Motion does not address the fact that its requests require a special study. *See* Mot. at 8.

The use of search terms does little to mitigate the undue and unreasonable burden placed on Applicants as a result of these requests. During the parties' December 1, 2021 meet and confer, UP suggested it would provide five commodities to limit searches, and KCS agreed that, if the searches were reasonable, it would produce responsive documents. UP waited three weeks—until mid-day on Friday, December 24, Christmas Eve—to identify its five commodities. *See* Mot.'s Ex. C at 16. KCS undertook further investigation of how to conduct searches and determined that, even with limited commodities and running searches, the results would be too burdensome. *See* Mot.'s Ex. C at 15. As KCS explained in its response on January

⁵ UP originally sought documents for an 18-year period, from 2004 to present. Due to KCS's document retention policy, KCS informed UP during the first meet and confer that documents going back 18 years likely didn't exist, but that documents from around 2016 to present may exist.

5, 2022, the searches would return customer-by-customer granular discussions, unnecessary for the proceeding. Mot.'s Ex. C at 14-15. Attempts to explain why were met with UP's insistence to try terms. *See, e.g.*, Mot.'s Ex. C at 5-6, 8-9, 12. When KCS tried running terms with no success, UP's only response was to try more search terms.⁶ *Id.*

As KCS explained, the requests misunderstand KCS pricing and the commodities are large; therefore, without a special study to know which customers and times period are at issue, search terms have to be broad:

UP and competition with UP is not dispositive. Individual customers, individual lanes are. We ran your proposed search strings just as you suggested in order to try to narrow the request. 206 documents came back and that is with the fact that the search picks up iterations of "up" (such as duplicate, supposition, update, and up). Not a single document was responsive. Not one document had "KCSM-KCS" or "KCSM-UP." The vast majority of documents had nothing to do with pricing or rates. Not one document discussed UP, let alone in terms of lanes or rates or competition.

This is why KCS originally ran just the commodities as terms when trying to determine the scope of a reasonable search. Benzene, the narrowest commodity you asked for, returned 13,000 documents for one year. There is no clear way to distinguish between rate discussions that are relevant [meaning a customer or lane in which UP or BNSF competes with KCS] and just any rate discussion without reading the document and knowing beforehand that UP and KCS compete for it.

See Mot.'s Ex. C at 1-2. UP's response was to file this Motion to Compel, which reneges on UP's agreement to limit commodities and now seeks an order compelling KCS to produce documents on all commodities. Mot. at 9. This request exponentially expands the burden.

⁶ It should be noted that while BNSF is seeking similarly broad discovery, BNSF agreed to and identified narrow searches on specific products (*e.g.*, "refrigerator" or "humidifier" or specific product ID codes). Yet even these, more limited search strings returned an unreasonable amount of hits. The string (("UP" OR "Union Pacific" OR "BNSF") AND KCSM) AND ("Ojo Seco" AND ("3632112" OR refrigerator)) returned 25,815 hits for the year 2019 alone.

Nothing in UP's motion indicates why UP would need all commodities when it believed five was sufficient. UP's request is purely punitive. For this reason alone, UP's motion should be denied.

Discovery is broad, but it is not unlimited. Various principles provide discovery parameters, including undue burden or expense. 49 C.F.R. § 1114.21(c); *see also Tongue River Railroad Co., Inc.—Rail Construction & Operation—In Custer, Powder River & Rosebud Counties, Mont.*, 2014 WL 4457251, at *3 (“[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.”); *Canadian Pacific Railway Company—Control—Dakota, Minnesota & E. Railroad Corp.*, Finance Docket No. 35081 (STB Decision No. 8 served Mar. 27, 2008) (“CP/DME Dec. No. 8”) at 4-5 (denying discovery where the request is so broad as to require review of all of the party's documents related to grain in order to determine if relevant documents exist.). UP seeks documents that represent, at a minimum, five years of KCS's ratemaking business. Search terms cannot overcome the foundational problems that such requests require a special study to make search terms viable.

III. The discovery sought by UP lacks probative value.

In 2004, the Board imposed a condition on KCS that it keep the Laredo gateway open on “commercially reasonable” terms as part of its approval of KCS's acquisition of the Texas Mexican Railway Company. *See Tex Mex Decision* at *16-19. The Board rejected UP's efforts at that time to impose stricter, more concrete conditions. *Id.* As UP indicated, “[t]he Board has said, for example, that party seeking conditions involving more than a promise of ‘commercially reasonable rates’ must ‘rebut’ the presumption that ‘end-to-end’ mergers – combinations of railroads that connect only a single point – will not affect consumers adversely.” *Mot.* at 4. But the evidence is not aligned with UP's goals. Shippers who believed that KCS has attempted to

close the Laredo gateway, or offer non-commercially reasonable rates, had a number of avenues to complain, including to the Board. None have, ever. Applicants responded to numerous discovery requests aimed at “commercially reasonable” terms, and KCS confirmed that not a single shipper has complained they were not offered “commercially reasonable” terms. *See, e.g.,* Ex. B, Applicants’ Joint Responses and Objections to UP’s First Set of Discovery, Nos. 61, 62, 65 & 79. As nothing supports UP’s efforts, the only remaining option is to fish through the KCS’s rate discussion documents to try to engineer an example of KCS offering a “non-commercially reasonable” term.

Even if relitigating the 2004 acquisition were relevant (which it is not), if KCS is compelled to comply with these burdensome discovery requests, the results have little, if any, probative value. Assuming KCS performed a special study to determine which customers and lanes were responsive, a search would produce only pieces of rate discussions. Assuming UP could piece something together, it would then have to figure out whether that discussion is “commercially reasonable.” The Board did not define “commercially reasonable” in its 2004 Tex Mex decision. *See* Tex Mex Decision at 19. There are no set metrics; there are no dollar caps. There is no ruler by which UP could even determine, at this later date and with full hindsight, whether a particular rate offered for one customer in 2019 for intermodal traffic between Mexico City and Kansas City is “commercially reasonable” without wild speculation. There is little benefit to such an exercise for this proceeding, and the *de minimus* value does not outweigh the burden on KCS to produce the documents that would be required to undertake it. *See Tongue River*, 2014 WL 4457251, at *3 (“[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.”).

CONCLUSION

Discovery in this matter must be appropriately limited to the impacts of the proposed merger, and whether CP's acquisition of KCS causes competitive harm or changes KCS's incentives. Applicants have produced significant volumes of information. Applicants have worked diligently and in good faith—spending an enormous amount of management and attorney time, money, and resources—in order to collect, review, and produce responsive documents. To date, Applicants have made 11 productions, culminating in a production of an additional 3,257 responsive documents, totaling more than 36,000 pages, as well as numerous narrative interrogatory responses and a number of informal, expedited discovery requests.

UP asked for and received discovery on how KCS prices the Mexico-leg of movements on which UP competes with KCS for cross-border traffic. Applicants have responded to interrogatories on pricing and “commercially reasonable” terms. To the extent UP argues that KCS's past pricing is relevant, UP has a multitude of methods to test its theory: KCS's pricing policies from 2015 to present; rate justification examples (setting out how and why rates differ); compliance program review results; a number of interrogatories relating to “commercially reasonable” terms; KCS's waybill data demonstrating the actual rates offered and accepted; and pricing strategy documents. All of this material has been produced and is in UP's possession.

The efforts required to review and produce five years' worth of email communications detailing customer-by-customer discussions is not justified. This is not an oversight case. There is no active complaint about KCS's compliance. No shipper or railroad received a “non-commercially reasonable” rate or ever complained to the Board about KCS pricing. Because the discovery sought by UP is unnecessary and burdensome, Your Honor should deny UP's Motion to Compel.

Respectfully submitted,

Dated: February 7, 2022

/s/ William A. Mullins

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Counsel for CP

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Reply to Union Pacific Railroad Company's Motion to Compel to be served electronically or by first-class mail, postage pre-paid, on all parties of record in these proceedings.

/s/ Julia Adrian
Julia Adrian

February 7, 2022

From: "Rosenthal, Michael" <mrosenthal@cov.com>
To: "WMullins@bakerandmiller.com" <WMullins@bakerandmiller.com>
Cc: David Meyer <David@MeyerLawDC.com>, "eglavich@bakerandmiller.com" <eglavich@bakerandmiller.com>

Date: Friday, January 28, 2022 11:13AM
Subject: RE: FD 36500 - Motion to compel

Bill,

As much as I'd like to find a simple solution, I can't see how the discovery responses would resolve the issues UP is trying to address through the motion to compel. The information UP is seeking through the motion to compel would address how KCS actually prices its single-line service and KCSM's interchange services where UP and KCS compete for business originating and terminating in Mexico. I don't see how an explanation of the policy document could provide equivalent information.

Regards,

Mike

From: WMullins@bakerandmiller.com <WMullins@bakerandmiller.com>
Sent: Friday, January 28, 2022 10:51 AM
To: Rosenthal, Michael <mrosenthal@cov.com>
Cc: David Meyer <David@MeyerLawDC.com>; eglavich@bakerandmiller.com
Subject: Re: FD 36500 - Motion to compel

[EXTERNAL]

Mike

I would like to request that you review our answers to UP's 3rd set of discovery and then let's talk about your motion to compel. I think our answers to your 3rd set should go a long way to show how KCSR and KCSM set prices, the process, and provide you with the background and information that you need. If after you review the answers, we can then talk about your motion to compel.

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The above message may be privileged, confidential and protected from disclosure by attorney/client, work product or other privileges. If you believe that it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error. Then delete it. Thank you.

-----"Rosenthal, Michael" <mrosenthal@cov.com> wrote: -----

To: Bill Mullins <wmullins@bakerandmiller.com>, David Meyer <David@MeyerLawDC.com>
From: "Rosenthal, Michael" <mrosenthal@cov.com>
Date: 01/27/2022 07:53PM
Subject: FD 36500 - Motion to compel

David and Bill, I've attached a highly confidential version of a motion to compel that we just filed. The only potentially HC information is in Exhibit C, and it would not be HC as to KCS.

Regards,

Mike

[attachment "UP8_MTC_HC_012722.pdf" removed by William Mullins/bakermiller]

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.*
– CONTROL –
KANSAS CITY SOUTHERN, *ET AL.*

**KANSAS CITY SOUTHERN AND CANADIAN PACIFIC’S JOINT RESPONSES AND OBJECTIONS
TO UNION PACIFIC RAILROAD COMPANY’S FIRST SET OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. Part 1114, Subpart B, Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, “Canadian Pacific” or “CP”) and Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, “KCS”; together with CP, the “Applicants”) hereby respond and object as follows to Union Pacific Railroad Company’s First Set of Discovery Requests to Applicants (the “UP Requests”) served on November 8, 2021 in connection with the above-captioned proceeding.

GENERAL OBJECTIONS

The following General Objections apply to each of the UP Requests and shall have the same force and effect as if set forth in full in response to each individually numbered UP Request.

1. Applicants object to the UP Requests and to each Definition, Instruction and Request contained therein to the extent they purport to impose upon the Applicants burdens

information that is substantially old, and information and documents may no longer be available or complete, or difficult to find.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants will provide non-privileged and non-duplicative documents responsive to this Request that they are able to locate after a reasonable search (to the extent any such documents exist).

Request No. 61:

Describe in detail the meaning of the phrase “commercially reasonable terms” as used on page 17 of the Ottensmeyer VS.

Response to Request No. 61:

In addition to the General Objections set forth above, Applicants object to this Request on the grounds that it is unduly burdensome and not proportional to the needs of this proceeding. Applicants further object to this Request on the grounds that the Application speaks for itself. Applicants further object to this Request to the extent that it improperly calls for legal analysis, arguments or conclusions.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants respond that the phrase “commercially reasonable terms” as used in this context (Application Vol. 1 at 1-203) refers to the same commitment addressed in Applicants’ Response to Request No. 40.

Request No. 62:

Describe in detail how KCS has implemented the condition on the KCS-TM-TFM transaction requiring it to “keep the Laredo gateway open on commercially reasonable terms,” as described on page 21 of the Ottensmeyer VS.

Response to Request No. 62:

In addition to the General Objections set forth above, Applicants object to this Request on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this proceeding. Applicants further object to this Request to the extent that it improperly calls for a legal analysis, arguments, or conclusions. The KCS-TM-TFM transaction was approved in 2004, almost 17 years ago to the day. The condition that KCS “keep the Laredo gateway open on commercially reasonable terms” has been in place since that time. It is unduly burdensome and not proportional to the needs of this proceeding to describe in detail every interaction that has occurred between KCS and any other party regarding implementation of this condition since 2004. Further, Applicants object to this Request to the extent that it seeks a legal conclusion or legal analysis regarding which terms, or how terms, are “commercially reasonable” or to the extent the Request requires a special study regarding terms implemented since the KCS-Tex Mex-TFM transaction. Applicants further object to the extent this Request seeks confidential and proprietary information that is neither relevant nor proportional to the needs of this proceeding. Applicants further object to this Request to the extent it requires KCS to conduct a special study.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants incorporate by reference their Response to Request Nos. 40 and 61. Applicants further respond that applying KCS’s commitment to “keep the Laredo gateway open on commercially reasonable terms” by its nature calls for flexibility in light of the specific circumstances of any individual shipper’s request.

KCS notes that the Board declined in the 2004 proceeding to impose further conditions as proposed by BNSF, UP, other railroads and shippers, and further declined to more

definitively define “commercially reasonable terms.” The Board also did not require the NITL Agreement to be imposed as a condition to the merger; allowing that to remain a private agreement between KCS and NITL. The Board held that any competitive concerns regarding the transaction were addressed by holding KCS to its pledges to keep the Laredo gateway open. *See KCS/Tex Mex*, Decision No. 12 at 17 (STB served Nov. 29, 2004).

Further, while KCS made the pledges willingly and voluntarily, parties were not without recourse if KCS failed to abide by its commitments. KCS submitted status reports following the consummation of the transaction to ensure a smooth transition. Parties could have brought issues before the Board in a variety of ways. No party has ever brought either a formal or informal complaint to the Board regarding KCS’s implementation of the “Laredo Gateway” condition. The KCS-NITL Agreement provided dispute resolution where terms were unsatisfactory. No shipper since 2004 has raised a dispute under the NITL Agreement. As set forth in Mr. Ottensmeyer’s Verified Statement, since the KCS-Tex Mex-TFM transaction, KCS confirms that “there has not been a single complaint from railroads or shippers that KCS and KCSM were foreclosing the Laredo gateway in any way.” *See Ottensmeyer VS* at 22 (Application Vol. 1 at 1-208).

Request No. 63:

Identify the “Mexican law” that purportedly “requires KCSM to give a rate to/from the Laredo gateway.” *See Ottensmeyer VS*, page 21, footnote 18.

Response to Request No. 63:

In addition to the General Objections set forth above, Applicants object to this Request on the grounds that it is unduly burdensome and not proportional to the needs of this proceeding, including because UP has the same access to “Mexican law” as KCS, all of which is

publicly available. Applicants note that the legal paradigm governing KCSM's predecessor was litigated extensively in the *KCS/Tex Mex* proceeding, in which UP submitted substantial comment and expert analysis of the Mexican law at issue here.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants respond that the "Mexican law" referred to in the Ottensmeyer V.S. at 21 n.18 (Application Vol. 1 at 1-207) is a shorthand for the body of legal principles applicable to and that interplay with rail rates in Mexico. This includes, without limitation, statutes, regulations, court opinions, decrees, and other official standards. The principal laws related to KCSM's use and enjoyment of the Concession granted it are the Concession Law and Mexican Railway Law and related regulations.

The principal laws related to KCSM's use and enjoyment of the Concession granted it are the Concession Law and the Regulatory Railway Service Law ("LRSF"). The LRSF obligates KCSM to provide public freight rail transportation service ("SPTFC") to all users on a non-discriminatory basis. KCSM also has the obligation to register its maximum freight rates with the Mexico's Railway Transport Regulatory Agency ("ARTF"). These maximum tariff rates are known as "TUCE" rates. KCSM has the right to offer shippers discounts from the TUCE rates. These are known as "Commercial rates." All Commercial rates are to be offered to shippers in a non-discriminatory manner. As a result of the interplay of these laws, if KCSM provides one shipper with a rate from Mexico to the Laredo gateway, it must in general also provide other shippers with a similar rate.

Request No. 64:

Produce all documents studying, analyzing, or discussing the "Mexican law" identified in response to Request No. 63.

Response to Request No. 64:

In addition to the General Objections set forth above, Applicants object to this Request on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this proceeding. Applicants further object to this Request to the extent that it seeks documents protected from discovery by the attorney-client privilege, attorney work product doctrine or any other applicable privilege, protection, immunity, law, or rule. This Request is not limited in scope in any manner, either to KCSM, KSC, or in any way as to the operations of a railroad. This Request is not limited in geographic scope nor temporal scope. This Request is overbroad and unduly burdensome to the extent that it seeks documents not relevant or proportional to the needs of this proceeding. Further, this Request clearly seeks documents that are privileged and otherwise protected from disclosure.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants will provide non-privileged and non-duplicative documents responsive to this Request that they are able to locate after a reasonable search (to the extent any such documents exist).

Request No. 65:

Identify the “remedies” that shippers will purportedly have “to ensure” KCSM provides commercially reasonable rates and terms to/from the Laredo gateway so shippers can “utilize KCSM/UP or KCSM/BNSF routings.” See Ottensmeyer VS, page 22.

Response to Request No. 65:

In addition to the General Objections set forth above, Applicants object to this Request on the grounds that it is overbroad, unduly burdensome, and not proportional to the

needs of this proceeding. Applicants further object to this Request to the extent that it improperly calls for legal analysis, arguments or conclusions.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants respond that among the remedies available to shippers to ensure that CPKC keeps the Laredo gateway open on commercially reasonable terms are: (a) enforcement of the agreement entered into between KCS and NITL to do so with respect to traffic affected by the KCS/Tex Mex/TFM transaction, which provides contractual remedies (*see* Verified Statement of John Brooks at 21 (Application Vol. 1 at 1-232)), (b) enforcement of the condition imposed on KCS in the *KCS/Tex Mex* proceeding requiring KCS to honor its commitment to keep the Laredo gateway open on commercially reasonable terms, which provides remedies available to the Board to enforce compliance with this commitment; and (c), as noted in Applicants' response to Request No. 14, enforcement of the condition that Applicants anticipate the Board will impose requiring them to honor the commitment they have made in this proceeding to keep the Laredo gateway open on commercially reasonable terms. In addition, and more fundamentally, Applicants will be disciplined by the marketplace, in the sense that they would face the loss of traffic opportunities to alternative rail routes or other transportation options were they to insist on commercially unreasonable terms or otherwise "close" a gateway that shippers would prefer to use.

Request No. 66:

Produce all documents supporting the statement on page 22 of the Ottensmeyer VS that "if the combined CP/KCS tried to raise rates on KCSM movements that are not rail dependent, the traffic would shift to motor or water carriage."

intended to provide illustrations of the kinds of obstacles referenced in the quoted phrase from Paragraph 33 (see Application Vol. 1 at 1-228).

Request No. 78:

Describe the meaning of the phrase “traffic that naturally flowed over our route network,” as the phrase is used on page 17 of the Brooks VS.

Response to Request No. 78:

In addition to the General Objections set forth above, Applicants object to this Request on the grounds that it is unduly burdensome and not proportional to the needs of this proceeding. Applicants further object to this Request on the grounds that the Brooks VS speaks for itself.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants respond that the quoted phrase (Application Vol. 1 at 1-228) refers to traffic that shippers chose to route via CP-KCS interline routes even in the absence of an alignment of economic interests between the two railroads and resulting investments by them in service or rate improvements that would have made CP-KCS interline routes more attractive relative to the alternatives available at the time.

Request No. 79:

Identify any shipper that has inquired about arbitrating a dispute under the agreement between KCS and The National Industrial Transportation League on page 20 of the Brooks VS, and produce all documents regarding any such inquiry.

Response to Request No. 79:

In addition to the General Objections set forth above, Applicants object to this Request on the grounds that it is overly broad, unduly burdensome, and not proportional to the

needs of this proceeding. The KCS-NITL Agreement was entered into in 2004, 17 years ago, and has been in effect since that time. It is unduly burdensome to identify “any shipper” and produce responsive documents regarding a shipper that has only made “inquiry” about the arbitration provisions of the agreement from 2004 to date, nor is such effort proportional to the needs of this proceeding. Applicants further object to this Request to the extent that it seeks confidential and proprietary information that is not relevant to the subject matter of the proceeding.

Subject to and without waiving the General Objections and the specific objections set forth above, Applicants can respond that no shippers have invoked the Agreement’s dispute resolution and, based on reasonable inquiry, no shippers have even “inquired” about the Agreement’s arbitration remedy in at least the past 13 years.

Request No. 80:

Produce all documents studying, analyzing, or discussing the meaning of the phrase “commercially reasonable rates and terms,” as used on page 22 of the Brooks VS.

Response to Request No. 80:

In addition to the General Objections set forth above, Applicants object to this request on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of this proceeding. Applicants have previously defined “commercially reasonable terms” (Requests No. 40, 61, & 71), and responded to Requests relating to how the conditions and terms requiring “commercially reasonable terms” have been and will be implemented (Requests No. 62 & 65), and incorporate those Responses by reference. Because the application of the “commercially reasonable terms” standard is by its nature flexible, the Request could be read as encompassing nearly every document that “discusses” a rate or term relating to the Laredo