

BEFORE THE
SURFACE TRANSPORTATION BOARD

304674

Docket No. FD 36500ENTERED
Office of Proceedings
June 1, 2022
Part of
Public RecordCANADIAN 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.

—CONTROL—

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

**UNION PACIFIC RAILROAD COMPANY’S REPLY TO APPLICANTS’
MOTION TO COMPEL DISCOVERY**

Union Pacific Railroad Company’s agreement during the May 24, 2022, conference call among Applicants, UP, and Administrative Law Judge McCarthy to complete its rolling production of responses for discovery requests to which there is no disagreement by June 7, 2022, makes most of Applicants’ Motion to Compel irrelevant. *See* Order Memorializing May 24, 2022 Conference Call (STB served May 26, 2022).

UP is also withdrawing its objections to conducting reasonable searches for responsive, non-privileged, non-electronic documents with regard to discovery requests to which it has otherwise agreed to produce responsive documents. UP will endeavor to complete its rolling production of any such documents by June 17, 2022.

In the remainder of this filing, UP addresses the seven categories of documents identified by Applicants in their Motion to Compel and UP’s current plans to search for and produce responsive, non-privileged documents. Based on Applicants’ statements

during the May 24 conference call, UP believes only one category of documents remains in dispute.

Category 1: Data Requests. UP has produced responsive car movement, train movement, and traffic tape data. UP believes there are no outstanding issues.

Category 2: Capacity/Operations Since 2018. Category 2 seeks information about capacity and operational changes in the Houston area related to UP's adoption and subsequent implementation of an operating strategy called "Unified Plan 2020," which is sometimes described as UP's version of an operating approach adopted by CP, KCS, and many other railroads called "Precision Scheduled Railroading" or "PSR." In response to the discovery requests described in Category 4, UP has produced a significant number of documents regarding capacity in the Houston area since 2018. However, UP objects to searching for and producing documents specifically relating to UP's Unified Plan 2020, primarily on relevance and burden grounds.

In this proceeding, Applicants must show that their proposed transaction is in the public interest. UP has argued that Applicants failed to make this showing because they did not adequately address the impacts of their proposed transaction on rail capacity in the Houston area (and other areas). UP agrees that Applicants are entitled to discovery from UP regarding capacity in the Houston area (which Applicants seek in Category 4). However, Applicants must address the impacts of their proposed transaction on current rail operations, not hypothetical operations that might exist if UP's operations were designed differently—*e.g.*, to accommodate Applicants' planned post-transaction operations.

Applicants' Motion to Compel does not contain a single word explaining why Applicants contend the discovery requested in Category 2 is relevant. The Motion to Compel should be denied for that reason alone.¹

During the May 24 conference call, UP understood Applicants to say they want to challenge the wisdom of UP's adoption of Unified Plan 2020—apparently by arguing UP operations consume too much Houston-area capacity. However, Applicants did not claim in their Application that Houston would have sufficient capacity to accommodate their planned operations but for UP's adoption of Unified Plan 2020. And UP did not address its Unified Plan 2020 in its Comments. Accordingly, Applicants cannot raise issues involving UP's Unified Plan 2020 in attempting to rebut UP's Comments.² The restriction on the permissible scope of rebuttal is especially important here, because UP will have no opportunity under the current procedural schedule to respond to whatever Applicants might say about UP's Unified Plan 2020 by presenting its own evidence on the issue.³ Because Applicants could not use the information they seek for permissible purposes, UP should not be required to provide the requested discovery.

¹ See, e.g., *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry.*, FD 35743, slip op. at 10 (STB served Sept. 23, 2014) (denying discovery where requesting party “has not demonstrated that [requested] documents are relevant to the issue in this proceeding”).

² See 49 C.F.R. § 1112.6 (“Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed.”).

³ See, e.g., *Tx. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 573, 664 (2003) (rejecting rebuttal evidence because opposing party “has had no opportunity to respond to this evidence”); *W. Fuels Ass’n, Inc. v. BNSF Ry.*, No. 42088, slip op. at 102 (STB served Sept. 10, 2007) (“WFA’s attempted change of routes was not within the permissible scope of rebuttal, and BNSF did not have an opportunity to challenge the new routes.”).

If Applicants decide to pursue irrelevant, improper arguments despite the Board's rules, they should not be allowed to do so at UP's expense. UP has produced extensive operational data regarding its train and car movements in the Houston area, as well as documents regarding Houston-area capacity. Also, as Applicants themselves noted during the May 24 conference call, KCS operates over UP's tracks in the Houston area, so KCS personnel presumably have knowledge about UP operations. At this point in time, UP is not trying to preempt Applicants from making whatever arguments they choose to make. However, UP should not bear any additional discovery burdens associated with Applicants' choice.

Category 3: Gateways/Foreclosure. Applicants and UP appear to agree on the substance and timeframe for this request. UP's agreement to search for and produce any responsive, non-privileged, non-electronic documents should eliminate any outstanding issues. UP will endeavor to complete its rolling production of any non-electronic documents by June 17, 2022.

Category 4: Capacity In General. Applicants and UP appear to agree on the substance of this request and the timeframe for most of this request. UP will produce formal studies and analyses of capacity and capital on UP facilities over which KCS operates, and CP and KCS facilities over which UP operates, from 2018 to the present. UP described its intended use of the term "formal studies and analyses," as opposed to Applicants' insistence on production of "All Documents," during a May 9, 2022, meet and confer discussion, and Applicants appeared to accept that approach. Motion at 11. UP plans to complete its rolling production of such documents by June 7.

Applicants also requested data reflecting line capacity and actual traffic levels for “each line segment on UP’s network.” UP has produced such information for UP lines over which KCS operates, which are the only UP lines relevant in this proceeding.

UP believes the parties’ only disagreement relates to Applicants’ request for information related to capacity improvements in the Houston Terminal area since 1997. UP believes such ancient information has no relevance to this proceeding. However, to avoid unnecessary disputes, UP will conduct a reasonable search for formal studies and analyses regarding Houston Terminal area capacity needs and produce any responsive, non-privileged documents that it locates. UP will endeavor to complete its rolling production of any such documents by June 17, 2022.

Category 5: Mexican Regulatory. Applicants’ requests for correspondence between UP and Mexican officials regarding the possibility of UP obtaining a Mexican rail concession is nothing more than a fishing expedition by Applicants to determine whether they might someday face competition from UP in Mexico if their proposed transaction is approved. However, to avoid unnecessary disputes, UP will conduct a reasonable search for such correspondence and endeavor to produce any responsive, non-privileged documents that it locates by June 17, 2022.

Category 6: Executive Documents. Based on Applicants’ representations during the May 24, 2022 conference call, UP understands that Applicants are seeking UP Board of Directors materials (*i.e.*, minutes, presentations) regarding decisions made by UP as a result of the proposed CP/KCS transaction relating to capacity investment. To avoid unnecessary disputes, UP will conduct a reasonable search for such materials and produce any responsive, non-privileged documents that it locates. However, UP intends

to redact all non-responsive material from any document it produces. UP will endeavor to produce such documents by June 17, 2022.

Category 7: Merger-Related Documents. Applicants asked UP to search for pleadings from certain prior mergers involving UP. UP agreed to search for electronic copies of such documents, and it has determined that none exist. Applicants also asked UP to search for communications between UP and Norfolk Southern about the Meridian Speedway in connection with the proposed CP/KCS transaction. UP has not identified any documents containing any such communications.

* * *

UP is proceeding with the discovery process as outlined above, which involves conducting reasonable searches for relevant information requested by Applicants.

Applicants' Motion to Compel should be denied.

Respectfully submitted,

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June 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2022, I caused a copy of the foregoing document to be served by email or by first-class mail, postage prepaid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all other parties of record.

/s/ Michael L. Rosenthal