

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 733

EXPEDITING RATE CASES

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Union Pacific Railroad Company submits these reply comments to provide our individual perspective on several issues raised by the comments in this proceeding. Union Pacific also joins in the reply comments of the Association of American Railroads (“AAR”).

In this proceeding, shipper and railroad stakeholders have endorsed several measures that should facilitate the expeditious resolution of rate cases. However, the additional proposals in the opening comments of shipper parties would not expedite rate cases. Instead, they would impose increased, unrealistic burdens on defendants and undermine opportunities to streamline rate case proceedings. As discussed below, Union Pacific supports the Board’s proposals in the Notice of Proposed Rulemaking served March 31, 2017 (“NPRM”), with the minor changes suggested by AAR.¹ We urge the Board to reject the changes suggested in the joint comments of the Western Coal Traffic League and others (collectively, “Coal Shippers”), and the joint comments of the American Chemistry Council (“ACC”), The Fertilizer Institute (“TFI”), and The National Industrial Transportation League (“NITL”).

¹ See Comments of the Association of American Railroads at 6 (clarify that the staff liaison and the appointed mediator will be two separate individuals); *id.* (delegate additional authority to the staff liaison); *id.* at 7 (clarify that the parties’ access to their own data should continue to be addressed in protective orders); *id.* at 8 (adopt a word-count limit for briefs).

I. The Board should reject shippers' proposed changes to its discovery rules.

Union Pacific supports the Board's proposals to require a complainant to certify that it has served its initial discovery requests with its complaint and to require a defendant to certify that it has served its initial discovery requests with its answer. Union Pacific also supports the Board's proposed meet-and-confer requirement.

The Board should not require railroads to produce "Core SAC Data" no later than 30 days after the shipper files its complaint. *See* Comments of Coal Shippers at 3. Nor should it require railroads to produce "traffic data" within 90 days of initial discovery requests. *See* Comments of ACC, TFI, and NITL at 4-5.

Shippers' proposals are based on false claims that railroads delay production of discovery material in SAC cases. Production of discovery material in SAC cases, especially production of traffic data, is a resource-intensive, time-consuming process. A defendant cannot even begin the process of producing traffic data until the geographical and temporal limits of a case are settled. To explain some of the basic challenges involved in producing traffic data in SAC cases, Union Pacific is submitting a verified statement from Chris Sanford, the employee who has coordinated production of traffic data in our most recent SAC and simplified-SAC cases. As Mr. Sanford explains, producing traffic data in a SAC case requires railroad employees with many other significant job responsibilities to devote time and effort to developing information that Union Pacific does not maintain in the ordinary course of business. To produce traffic data in a SAC case, Union Pacific must identify non-issue traffic that could move over the SARR route (and thus share costs with the issue traffic), then identify the off-SARR route used by that non-issue traffic (to calculate revenue divisions). But Union Pacific does not directly capture such routing information in the ordinary course of business. Sanford VS at 2-3. To respond to requests for traffic data in rate cases, we must derive routing information from data we do capture. Union

Pacific has developed a basic methodology for accomplishing this task, but it takes substantial time and effort in each individual rate case to apply, test, and refine our methodology to ensure the traffic data we produce are accurate and reliable. *Id.* at 3-6. Given the critical role played by traffic data in SAC cases, allowing parties to take the time in the discovery stage necessary to produce accurate and reliable data ultimately advances the overall goal of expediting rate cases.

Moreover, there is no need to establish special deadlines for producing traffic data or other subsets of discovery material. ACC, TFI, and NITL urge the Board to establish “a firm deadline for the defendant to produce the traffic data,” because the production of traffic data “impacts how soon complainants can be ready to present their opening evidence.” Comments of ACC, TFI, and NITL at 4. However, the Board’s rules already provide firm discovery deadlines and account for a complainant’s need for time to prepare its evidence. The rules establish a 150-day discovery period, followed by a 60-day period for preparing evidence. The Board should not subdivide and micromanage the discovery period. Micromanaging discovery would just generate more litigation by creating new types of disputes for the Board to resolve, which would impose additional costs and delay. If shippers are concerned about having enough time to prepare their evidence, there is a simple solution that does not require any new rules: if a complainant in a particular case believes it needs more time to prepare evidence, it can request additional time.

Shippers’ proposed deadlines are also unrealistic. They assume railroads can and should begin producing traffic data without questioning the scope of a shipper’s discovery requests. In our experience, parties often need time before the traffic identification process can even begin to resolve issues regarding the SARR’s geographic scope and the date range for which information

should be produced. In *AEPCO II*,² for example, after Union Pacific objected to the geographic scope of complainant's initial discovery requests, the parties reached an agreement to exclude certain line segments in Arizona, California, and Texas. The reduction in the scope of discovery substantially reduced the burdens on Union Pacific. It allowed us to complete our production of responsive data faster than if we had not reached an agreement. However, the parties needed time at the outset of the discovery period to negotiate a satisfactory compromise.

Coal Shippers' proposed deadline is especially unrealistic and ignores their own position opposing the adoption of standard discovery terms.³ Coal Shippers not only want defendants to produce traffic data within 30 days after a shipper files its complaint, they want defendants to produce material that cannot even be identified until the traffic data are finalized—namely, lists of contracts and common carrier pricing authorities applicable to the traffic. *See* Comments of Coal Shippers, Att. 1. They also want many other categories of data defendants must collect or extract from systems designed for business purposes, not to facilitate discovery, and then review for accuracy and completeness. *See id.* For example, Union Pacific does not keep all “contracts for third-party services,” or “[c]urrent, normal course of business traffic and revenue forecasts,” or most of the other information Coal Shippers call Core SAC Data in a central file, sorted by geography, awaiting discovery requests in rate cases. Union Pacific works hard to respond to discovery requests promptly, but we could not feasibly produce the so-called Core SAC Data within 30 days after a shipper files its complaint.

² STB Docket No. NOR 42113.

³ *See* Joint Reply Comments of Coal Shippers at 23-24, (Aug 29, 2016) (asserting there is no “one-size-fits-all” definition and the “best approach is to leave definitions of cut-off-dates, and other discovery terms, to the parties’ discretion” subject to Board intervention as necessary).

Coal Shippers suggest that requiring defendants to produce Core SAC Data just 30 days after a shipper files its complaint is reasonable because defendants could begin compiling the data during the mandatory mediation period. *See* Comments of Coal Shippers at 30-32. Union Pacific still could not produce everything Coal Shippers request in that time frame.⁴ However, even if we could meet such a deadline, railroads should not be expected to begin compiling discovery material during the mediation period for at least three reasons.

First, we agree with the Board that the benefits from a pre-complaint mediation period will derive in large part from allowing the parties to “engage in mediation without the burden of simultaneous litigation and discovery.” NPRM at 4. Coal Shippers’ proposal would essentially transform the pre-filing notice into a complaint, immediately triggering the start of discovery. Coal Shippers’ proposal ignores the burdens involved in addressing disputes over the scope of discovery and in coordinating the process of document searches and data collection.

Second, Coal Shippers ignore that their proposal would entail a tremendous waste of resources if mediation succeeds. They say a successful mediation would mean “the carrier will not need to engage in any production.” Comments of Coal Shippers at 32. But their exclusive focus on “production” ignores all the resources carriers would expend in preparing for the potential production—that is, the resources necessary to generate traffic data and to search for, collect, and review all the other Core SAC Data.

Third, mediation is not necessarily an “all or nothing” exercise. Rate cases can involve multiple origins and multiple destinations. Even if mediation does not produce a full settlement,

⁴ Certain elements of the so-called Core SAC Data are relatively easy to produce, and we can and do produce such material early in the discovery period. In fact, shippers themselves could obtain Wage Form A and B reports from the Board’s website.

parties may be able to resolve part of their dispute and thus substantially narrow the scope of discovery. In *AEPCO I*,⁵ for example, Union Pacific entered into an agreement that eliminated the portion of the complaint relating to traffic originating in Colorado. In *FMC*,⁶ complainants ultimately chose not to challenge several common carrier rates they asked Union Pacific to establish. The Board would be directly undermining the benefits of the new pre-complaint mediation process if it required parties to engage in discovery, and thus litigation regarding discovery, during the mediation period.

II. The Board should reject shippers' proposed changes to its rules governing establishment of common carrier rates.

The Board should reject Coal Shippers' request to adopt a "bright-line rule" requiring carriers to provide common carrier rates and service terms to shippers no later than 90 days prior to the date common carrier service subject to those rates is anticipated to start. *See* Comments of Coal Shippers at 29. As Coal Shippers acknowledge, the NPRM does not address the "issue of when the carrier is required to provide . . . common carrier rates." *Id.* at 28. That is because the NPRM addresses the Board's rate case procedures, not its rules governing the establishment of common carrier rates. Accordingly, Coal Shippers are asking the Board to adopt a rule that would not be a logical outgrowth of the proposed rule. The Board may not accept such an invitation. *See, e.g., CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1079-82 (D.C. Cir. 2009) (discussing the "logical outgrowth" principle).

The Board does not need a special rule governing establishment of common carrier rates to implement the proposals in the NPRM—especially not a rule that purports to require carriers

⁵ STB Docket No. NOR 42058.

⁶ STB Docket No. NOR 42022.

to establish common carrier rates earlier than if there were no pre-complaint mediation process. Such a rule would subvert the entire purpose of pre-complaint mediation by transforming it into a mechanism for jump-starting the rate cases, rather than a mechanism for promoting settlement. Indeed, a rule requiring carriers to quote rates 90 days before common carrier service under the rates could start would have no purpose other than to jump-start rate cases. Even assuming such a rule were permissible,⁷ a carrier would retain its statutory right to increase the rate with 20-days' notice or reduce the rate with no notice. *See* 49 U.S.C. § 11101(c).

III. The Board should reject shippers' proposal to prohibit discussions of case merits with the staff liaison.

The Board should reject Coal Shippers' proposed rule that, "unless the parties otherwise agree," parties and the staff liaison are precluded from addressing "the merits of the case (or case evidence)." Comments of Coal Shippers at 27-28. We do not understand what line Coal Shippers are trying to draw by precluding discussions of "the merits of the case (or case evidence)." Such a vague rule would have a chilling effect on communications and undermine the usefulness of the staff liaison.⁸ The Board's general rules governing ex parte communications should address any legitimate concerns shippers may have. *See* 49 C.F.R. §§ 1019.3, 1102.2, 1103.14.

IV. The Board should reject shippers' proposal to clarify 49 C.F.R. § 1114.31(a).

The Board should reject Coal Shippers' request to clarify whether 10-day rule in 49 C.F.R. § 1114.31(a) applies to motions to compel document production. *See* Comments of Coal

⁷ *But see Burlington N.R.R. v. STB*, 75 F.3d 685, 694 (D.C. Cir. 1996) (criticizing agency decision as "no more than an end-run around the statutory scheme—jump-starting the rate review process well in advance of the earliest possible date at which common carrier service could begin, and thereby avoiding the practical force of the statutory limits on its authority").

⁸ In fact, as noted above, we support AAR's proposal to delegate additional authority to the staff liaison to address issues that might be perceived as addressing the merits of the case or case evidence. *See* Comments of AAR at 6.

Shippers at 35-38. The rule expressly applies only to motions to compel answers in connection with depositions and written interrogatories. No clarification is needed.

V. The Board should reject shippers' proposal to require staggered briefing.

The Board should reject the proposal by ACC, TFI, and NITL to require staggered final briefs. *See* Comments of ACC, TFI, and NITL at 7. Complainants currently get the last word on the evidentiary issues on which they bear the burden of proof because they have the opportunity to file rebuttal evidence. Final briefs are not evidence. As the Board correctly states, final briefs give parties an opportunity to focus the Board's attention "on the most important issues in SAC and Simplified SAC cases." NPRM at 9.

ACC, TFI, and NITL say "complainants' briefs are little more than an abridged repetition of their rebuttal legal arguments." Comments of ACC, TFI and NITL at 7. If their assertion is true, complainants may be wasting an opportunity provided by the rules. But it is no reason to change the intended role of final briefs.

Respectfully submitted,

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VERIFIED STATEMENT

OF

CHRIS SANFORD

My name is Chris Sanford. I am Director, Interline Marketing for Union Pacific Railroad Company. I began my railroad career with Chicago & North Western Railroad, where I worked for 12 years, until Chicago & North Western merged with Union Pacific. I have been employed by Union Pacific for 22 years. For the past 20 years, I have worked in Union Pacific's Interline Marketing Department. Through my work in the Interline Marketing Department, I have gained a strong working knowledge of Union Pacific's network and operations, and the various systems the railroad uses to collect waybill, train movement, and car movement data. As a result, one of my occasional responsibilities has been to help Union Pacific's legal team respond to discovery requests for traffic data in stand-alone cost ("SAC") and simplified-SAC cases.

I understand some shipper organizations have claimed that railroads delay production of traffic data in rate cases. That is simply not true at Union Pacific. We work diligently to respond to requests for traffic data. However, it takes substantial time and effort to produce accurate and reliable data in each case, because we do not develop the type of traffic data required for SAC cases in the ordinary course of business. When responding to discovery requests, we must start with the different types of data we routinely collect to support a variety of business processes—billing data used mainly for accounting purposes, car movement and train movement data used mainly for operating purposes—then use those data to develop the detailed information needed in rate cases. As I explain below, implementing our methodology requires a significant amount

of time and specialized knowledge. Only a few of us are familiar enough with all the issues to do the work efficiently, and we all have other business responsibilities that cannot be neglected.¹

When producing traffic data for rate cases, the basic challenge is to specifically track traffic movements over defined segments of our network. We must identify (i) non-issue traffic that could move over the SARR route, and thus share costs with the issue traffic, and (ii) the off-SARR route used by non-issue, cross-over traffic, so we can calculate revenue divisions (which requires route-specific information about distance travelled and relative traffic densities).

Specifically tracking traffic movements over our network is a difficult task for two main reasons. First, Union Pacific is a large, complex network, with many possible routes between any origin and any destination. For example, knowing a carload moved from Los Angeles to Chicago does not tell us whether the car moved over the South Central towards Salt Lake City, or via the Sunset Route towards El Paso. Knowing the car moved towards Salt Lake City does not tell us whether it moved over the Overland Route through North Platte, or via the Rio Grande and KP Line through Denver and Kansas City. Knowing the car moved on the Overland Route does not tell us whether it moved to Salt Lake City through Provo or Clover, Utah. I could go on and on with just this one example.

¹ My statement is focused on Union Pacific's current approach to producing traffic data in rate cases. In reviewing the comments filed in this proceeding, I noted that the Western Coal Traffic League and other coal shipping interests ask the Board to require railroads to produce "Waybill, Train and Car Movement data (including details required to use such data and all databases linked together in a functional manner)." Comments of Coal Shippers, Attachment 1.

In prior rate cases, Union Pacific has produced linked waybill and car movement data. We have never linked those data to train data. Based on my experience with the three sources of data at Union Pacific, I believe that creating a link among all three types of data would involve a substantial endeavor that could not be completed within the deadlines suggested by Coal Shippers.

The second reason tracking movements over our network is difficult is that we do not use this compilation of information in the ordinary course of business. Our key information systems tend to be either financial or operational in focus. To oversimplify, we collect data on how much revenue we generate on traffic moving from Los Angeles to Chicago, and how many cars and trains move over the specific line segments between Los Angeles and Chicago, but not in the same databases. Even focusing just on operating data, identifying the route used by a particular carload is rarely relevant. The nature of freight railroad operations can result in cars using many different routes between any single origin-destination pair because of factors such as: variability in plan design by type of traffic; variability on the demand side (*i.e.*, traffic levels); variability on the supply side (*i.e.*, availability of locomotives, crews, equipment); and scheduled and unscheduled events (*e.g.*, maintenance events, weather disruptions).

To meet the challenges posed by rate cases, Union Pacific has developed a methodology that lets us derive routing information from our carload movement data using reports of selected movement events and the geographic location of those events. We undertook the effort required to develop our methodology only after testing various commercially available network models and determining that, despite our extensive attempts to refine the models to better reflect actual operations (*e.g.*, by incorporating more event data, blocking plans, and train schedules), the most advanced models still produced results that were up to 60% different than actual results in terms of volume counts. In other words, we recognized that simply extracting data from our systems and running it through commercially available models would produce results that would not reflect reality and could not withstand scrutiny in a rate case.

Union Pacific invested significant resources in developing our methodology for modeling movements of cars across our network. That investment gives us a large head-start in responding

to discovery requests for traffic data in rate cases. However, that past investment leaves us far short of the finish line for several reasons.

First, Union Pacific's network changes over time, so the basic network information used to apply our methodology in one SAC case is bound to require adjustments before it can be used in a SAC case filed several years later. These adjustments include identification of new origins, new destinations, and changes in operating patterns that produce car events at new intermediate stations. Given the relative infrequency of SAC cases, we do not routinely update the network information used to apply our methodology. Instead, when we are presented with a request for traffic data, we apply the methodology to carload movement data, identify errors in the output (*e.g.*, cars that cannot be routed because of missing or non-matching information; cars that show movements over unrealistically long routes because of missing or non-matching information), research the possible reasons for the error (*e.g.*, identify new origin, destination, or intermediate stations connected with the movement at issue), modify the network information as necessary, then re-apply the methodology to the carload movement data to determine whether we corrected all the errors, or whether our corrections reveal more issues. The iterative process of identifying, researching, and correcting errors cannot even begin until the parties agree on the geographic and temporal parameters of discovery, and it unavoidably takes a long time because we are talking about hundreds of thousands, if not millions, of car movements—a large percentage of which will inevitably be different from the last time we produced traffic data in a rate case.

Second, but closely related to the first reason, different SAC cases focus attention on different portions of our network and different traffic movements. For example, there was little or no geographic overlap in the relevant traffic movements in our two most recent SAC cases:

IPA,² which involved Utah coal moving in Utah, and *AEPCO II*,³ which involved Powder River Basin and New Mexico coal moving to Arizona. As a result, even if we were hit with two SAC cases in quick succession, if the two cases involved issue traffic moving over different parts of our network, we would likely need to spend nearly as much time testing and revising the basic network information used to apply our methodology in each case. In other words, we do not update all our basic network information each time we have a SAC case. Instead, we focus on the portion of our network used by the traffic in each case.

Third, but closely related to first two reasons, changes to our network over time can include changes in the number of miles in particular line segments. As a result, we must confirm the mileages included in our basic network information before we apply our methodology. This takes time, but it cannot be avoided. Individually, the mileage changes may be relatively minor—a result of track realignments or other engineering projects. However, even small changes can have a critical impact when they affect hundreds, thousands, or perhaps tens of thousands of car movements in a SAC case. Moreover, when we produce information in discovery, we must produce accurate, up-to-date information, so we have no other choice.

Finally, once we have developed what we believe are accurate traffic data, we spend a substantial amount of time re-testing the data and developing appropriate documentation so the shipper's consultants and lawyers, and ultimately the Board, can understand the data. Having lived through several rate cases, I recognize the level of scrutiny that gets applied to the data railroads produce. When we produce traffic data, we are providing a long list of billing and operating information for each individual movement. If a shipper believes the data contain an

² STB Docket No. NOR 42136.

³ STB Docket No. NOR 42113.

error or inconsistency, parties may spend a substantial amount of time exchanging clarifying communications. Or a shipper might simply make flawed assumptions or corrections that the railroad must address in its reply evidence. It makes far more sense to spend the time required to thoroughly check and document our work *before* producing the traffic data, rather than expose both parties to the costs and delay they might incur later in the case if we did not make that effort in the discovery process.

VERIFICATION

I, Chris Sanford, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 14, 2017.

/s/ Chris Sanford