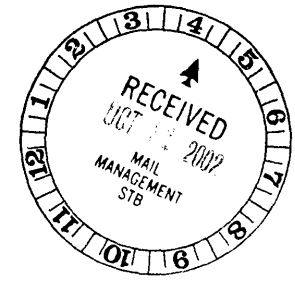


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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



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

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Union Pacific Railroad Company ("UP") provides these brief reply comments in response to several points made in the initial comments of other parties. UP also joins in the reply comments filed in this proceeding by the Association of American Railroads.

A. BNSF's Comments Regarding Discovery

In its initial comments, The Burlington Northern and Santa Fe Railway ("BNSF") notes a number of problems it has experienced with discovery in rate cases. Because UP has confronted many of the same types of discovery burdens BNSF describes, examples of UP's experience may assist the Board in evaluating the issues.

In particular, complainants in rate cases have served numerous discovery requests on UP. In Docket No. 42059, *Northern States Power Company Minnesota v. Union Pacific Railroad Company*, for example, the complainant served over 100 discovery requests. After the case was narrowed to only variable costs, Northern States

Power still propounded 60 discovery requests, with 188 subparts, and 26 interrogatories in three different requests. The scope in stand-alone cases is even broader. Responding to these requests has consumed large amounts of time of UP's employees and consultants. Because each rate case covers a different part of the railroad and different time periods, and complainants have added new requests with each new case, UP devotes enormous resources to responding to discovery in each case.

UP has found that complainants request some materials that are cumulative, despite the fact that the additional materials add little or nothing to the complainant's evidentiary presentation and even though producing the materials would require considerable time and effort. For example, in *Northern States Power*, the complainant sought, among other things, train dispatcher sheets for several years. UP explained that detailed information about the actual operations of NSP trains was available in numerous other sources UP produced, including train movement files, train delay records, and crew data. Moreover, since those other data were in electronic databases, parties could readily use them to perform cost analyses. By contrast, UP's train dispatching system is designed to support real time operations, not historical analyses. Consequently, producing archived train sheets requires manual effort to separately copy each dispatching territory for each day. The Board granted NSP's motion to compel production of a representative sample of the train dispatcher sheets. Docket No. 42059, *Northern States Power Co. Minnesota v. Union Pacific R.R. Co.*, Decision served May 24, 2002, at 4.

UP has also faced discovery requests and motions to compel on clearly improper discovery. Despite several recent decisions finding internal management cost methodologies and inputs are irrelevant and confidential, UP had to respond both to a shipper's motion to compel and its surreply. The Board agreed that the discovery requests were virtually identical to requests disallowed in prior decisions. *See Northern States Power*, Decision served May 24, 2002, at 8-9.

Furthermore, complainants have filed lengthy and complicated motions to compel against UP in some rate cases. For example, the motion to compel filed by NSP on November 9, 2001, referred to above, covered 11 different categories of information and was accompanied by a 19-page verified statement. Because of the length and complexity of the motion, and because it was required to reconstruct many months of discovery communications and to prepare its own verified statement to rebut NSP's assertions, UP found it impossible to complete its response to the motion to compel within 20 days. At UP's request, the Board extended the deadline for the reply, allowing UP a total of 28 days. *See* Docket No. 42059, *Northern States Power Co. Minnesota v. Union Pacific R.R. Co.*, Decision served November 23, 2001.

UP expects that the narrower discovery standard the Board has proposed, in combination with the proposed fee-shifting for motions to compel, will encourage parties to craft compromises enabling them to meet legitimate information requirements with reasonable production efforts. Indeed, if the Board is serious about moving rate cases along quickly, it is essential to confine the scope of discovery to those materials that are

essential to a complainant's presentation of evidence.¹ UP urges the Board to adhere to its proposal for a narrower discovery standard as an integral part of the effort to expedite rate cases.

B. Proposals Regarding Production of Confidential Rail Transportation Contracts

In response to requests for copies of rail transportation contracts, railroads frequently object based on contractual confidentiality provisions that require an order of the Board or a court before the contract may be produced and may also require that all other parties be notified of such orders. At least one commenter has suggested that the Board should issue a blanket order that requires production of such contracts (*e.g.*, as part of the protective order issued at the outset of the case), so that the complainant need not file a motion to compel to obtain the contracts.²

UP agrees that the resolution of questions regarding production of rail transportation contracts could be facilitated. However, the Board should not merely issue blanket orders for production of such contracts. In some cases, a railroad may have valid objections that go beyond concerns based on confidentiality provisions. In particular,

¹ For this reason, UP opposes any suggestion that the Board should automatically apply its decisions in prior rate cases to require production in any new case. In any event, this would be impractical, in view of the differences in the contours of each rate case and in the records maintained by different railroads.

² See Opening Comments of the Western Coal Traffic League, October 11, 2002, at 24-25. The National Coal Transportation Association suggests that motions seeking orders to satisfy those contract requirements be excused from the \$2300 fee. See Opening Comments of the National Coal Transportation Association, October 11, 2002, at 4. UP endorses the NCTA proposal, but for reasons discussed below, disagrees that automatic blanket production of contracts is the best way to ensure prompt production of contracts.

where a discovery request calls for production of hundreds, or even thousands, of contracts, the railroad may have a valid burden objection. In such cases, UP has succeeded in compromising by offering the complainant its choice of a reasonable subset of contracts which represent the majority of traffic the complainant has selected for its stand-alone railroad.

A blanket production order is undesirable for the additional reason that it gives insufficient weight to the interests of those shippers who are not parties and who strongly object to production of all or particular portions of their rail transportation contracts. In UP's experience, it is usually possible for the parties to address such concerns through negotiation. UP's practice is to notify shippers whose contracts have been requested, provide a copy of the relevant protective order, and invite them, if they object to production of the contract, to either intervene in the proceeding or contact the complainant's counsel to attempt to resolve any concerns. It is UP's experience that most shippers are prepared to allow production of their contracts subject to the terms of the protective order, but that a few feel strongly enough to take further steps. Most shippers in the latter category work with the complainant's counsel to negotiate limitations that are satisfactory to all parties.

Issuing blanket production orders for rail transportation contracts would foreclose such compromises without significantly expediting the production of contracts. The Board should retain procedures that will leave railroads free to assert valid objections and provide opportunities for shippers with strong concerns about confidentiality to

resolve their concerns informally with the complainant, or through intervention at the Board.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply
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